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JUDGES OF THE HIGH COURT

JANUARY—JUNE, 1929.

Chief Justice.

The Hon. Justice Sir Murray Coutts-Trotter, *Kt.*, M.A. (Oxon), (*Bar.-at-Law*).

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PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—VISCOUNT SUMNER, LORD ATKIN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Narendra Nath Dutta and another .. *Appellants**

v.

Sheik Abdul Hakim and others .. *Respondents.*

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Narendra Nath Dutta *v.* Sheik Abdul Hakim.

Civil Procedure Code (*V of* 1908), S. 110—*Substantial question of law—Documents—Construction of—Question as to—Documents forming root of title or basis of claim—Documents forming evidence in the case—Distinction—Revenue arrear—Existence of—Question as to—Fact or law—*Jama-wasil-bakis—*Evidence consisting of—Effect.*

In a case in which both the Courts below had concurrently found that no revenue payment had been in arrear at the time when a mahal was sold for arrears of revenue under Bengal Act XI of 1859 and had accordingly set aside the sale, *held*, that the fact that the evidence on which the finding of the Courts below was based consisted of the *jama-wasil-bakis* did not by itself take the case out of the rule as to concurrent findings of fact.

Where special documents, which are either themselves documents of title or are statements intended to have effect as claims, compromises, or surrenders of legal rights, are the material from which an inference is to be drawn, the special character of the documents assimilates the questions which they raise to questions intrinsically of law. The facts stated in the *jama-wasil-bakis* are, however, materials from which, when their purport is gathered, the inference of fact is finally to be drawn, namely, whether or not certain and sufficient payments had been made and made in time. Errors in those accounts, and obscurity in the mode of keeping them and of posting the amounts mentioned, are no more than similar errors and obscurities would be in oral testimony, and present the same difficulties in drawing a conclusion, but that conclusion, when once it is arrived at, is one of fact and no question arises of legal problems turning

*P.C. Appeal No. 12 of 1927. 21st June, 1928.

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on the construction of legal instruments. Nor does it avail to say that there is no error shown on the face of the accounts, and that the system on which they have been kept and the result which they show are quite plain, for that is not to state a question of law, but to disagree with the Indian Courts *in toto* on a matter of fact.

Appeal No. 12 of 1927 from a judgment and decree of the Calcutta High Court (Sir N. R. Chatterjea and Mr. Justice Graham), dated the 20th August, 1924, affirming a judgment and decree of the Subordinate Judge, Alipur, dated the 15th February, 1922.

The following are the facts of this case:—

The main question in issue between the parties was whether the annual rent of a holding, that is, Rs. 4-7-6 in respect of the year 1323 (1916-1917) which was payable on or before the 28th July, 1917, was in arrear or not. The respondent asserted that the rent had been paid and that the sale of the holding for an alleged arrear of rent was a nullity. Both the Indian Courts found as a fact that there was no arrear and accordingly set aside the sale.

The Subordinate Judge, in the course of his judgment, said:—

"It is clear from Ex. A that up to the year 1906-1907 there was no arrear due, *i.e.*, corresponding to the Bengali year 1313. If I now turn to the Ex. V I see from the year 1907-1908 to the year 1916-1917 corresponding to 1314 to 1323, there have been payments of ten years' rent for these ten years and so there could not have been any arrears due for the year 1323."

The learned Judges of the High Court affirmed the finding of the Subordinate Judge and concluded their judgment in the following words:—

"The *jama-wasil-baki* (Ex. A) which contains the accounts up to 1906-1907 (1313) does not show any arrear up to that year. The *jama-wasil-baki* (Ex. V) contains the accounts from 1907-1908 to 1915-1916 (1314-1323) *i.e.*, for ten years and shows ten payments. There could not, therefore, have been any arrear for 1323."

The High Court, therefore, made a decree affirming the decision of the Subordinate Judge and the defendants applied to the High Court for the usual certificate under S. 110 of the Code of Civil Procedure, 1908. The respondent contended that the proposed appeal to His Majesty in Council did not raise any substantial question of law, but by an order, dated the 2nd March, 1925, the High Court (Sir Lancelot Sanderson, Chief Justice and Sir George Rankin) granted the certificate in the terms following:—

"So far as I have been able to follow these entries (of *jama-wasil-baki*) the learned Judge's finding amounts to this, that in respect of the revenue which became due on the 28th June, 1916 the payment was made on the 16th July, 1915, and that, therefore, the payment of Rs. 4-7-6 which was made on the 28th March, 1916 was not in respect of the year 1322 corresponding to 1915 to 1916 but was in respect of 1323, which corresponds to 1916 to 1917. It seems to me that in this respect there is a question of con-

struction of the *jama-wasil-baki* which the appellants-defendants are entitled to raise in respect of this finding.

"It was argued by the learned Advocate who appeared for the plaintiff that this was entirely a question of fact and that there is a finding of the learned Judge, who tried the suit, which had been affirmed by the learned Judges of this Court, and that there was no question of law in this respect.

"In my opinion the judgment of the learned Judge, who tried the suit, depends upon the proper construction which is to be put upon the entries in the *jama-wasil-baki*, and that in my judgment cannot be said to be entirely a question of fact but it may be stated to be a question of law.

"I am therefore of opinion that in this respect a question of law is involved and I am not able to say that there is no substance in it. The result is that, in my judgment, a certificate should be granted."

De Gruyther, K. C. and *Parikh* for appellants.

B. Dube for respondents.

21st June, 1928. Their Lordships' judgment was delivered by

Viscount Sumner.

VISCOUNT SUMNER.—On the 10th April, 1918, the Collector of the 24 Pargannas issued his certificate, that on the 18th December, 1917, Mahal Panchannagram had been sold to the first appellant, under Act XI of 1859, for Rs. 4,700, the former proprietor, the second respondent, having fallen into arrear with his annual sadar jama of Rs. 4-7-6. The purchase took effect as from the 29th July, 1917, the formal proclamation, which was dated the 13th November, 1917, having announced that the mahal was to be sold for realisation of arrears of Government revenue "up to the talab of the 28th July, 1917, for the year 1323."

On the 17th February, 1919, the first respondent, in whom prior to the sale the whole tenure-holder's interest in the mahal had actually become vested, though his name had not been recorded, filed his plaint against the respondents 2 and 3 and against the appellants, praying for a declaration that the sale was invalid and for possession with mesne profits, the appellants, the auction purchasers, having gone into possession. Various irregularities and illegalities were alleged, which need not now be detailed, as, after adverse decisions of both the Courts in India, they are not persisted in, but it was further alleged that there had been no arrears of revenue, for which the property could be sold, which, if established, would result in the sale being set aside and the certificate cancelled.

The present appellants did not defend this suit and on the 22nd August, 1919, the first respondent having testified that

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"no arrears of revenue were due, when the property was put to sale," and those defendants, who are now respondents 2 and 3, not opposing, the officiating Subordinate Judge at Alipur decreed the suit *ex parte*. So matters stood till August, 1920, when the present appellants applied to have this decree set aside, on the ground that they had never been served with process at any stage of the proceedings and had only become aware of them in the previous month. After hearing evidence the Court set the decree aside and restored the suit to the original number, holding that the summonses had been fraudulently suppressed. As the learned Judge observed:

"It is impossible to think that the applicants should have remained silent, if they had any notice of the suit. The property in question, which fetched Rs. 38,000 on sale by the applicants, was purchased in revenue sale for Rs 4,700 by the applicants. The plaintiff alleges that no arrears of revenue sale were actually due. If his allegations be taken to be true, he lost the valuable property for no fault on his part After that revenue sale the plaintiff offered Rs. 10,000 to the defendants to get it back but the applicants were inexorable. It was, therefore, very natural for the plaintiff to take to any means to get back the property and to teach a lesson to the applicants"

These circumstances no doubt explain the absence from the judgments of the Courts in India of any reference to the evidence given by the first respondent himself, but it is not therefore to be assumed to be false and it at any rate removes any question as to the burden of proof, which has not indeed been raised at any stage.

The present appellants then put in extracts, relating to the mahal in question, taken from three successive sets of *jama-wasil-bakis* preserved among the documents of the Collectorate. The first ran from 1898-1899 to 1906-1907; the second from 1907-1908 to 1915-1916, and the third followed on the second and was brought up-to-date. After a careful examination of these extracts, with the general character of which they were obviously very familiar, both Courts, that of the second Subordinate Judge of Alipur and the High Court of Bengal on appeal found that no revenue payment had been in arrear at the time when the mahal was sold, and accordingly they set the sale aside. Leave to appeal to His Majesty in Council was subsequently given, the members of the High Court observing respectively (*a*) that the judgment of the Trial Judge "depends upon the proper construction which is to be put upon the entries in the *jama-wasil-baki*, and that cannot be said to be entirely a question of fact, but may be stated to be a question of law," and (*b*) that "the question whether it has correctly appreciated the

meaning of the other entries" (that is, the prior entries in the *jama-wasil-bakis*) "is one of some difficulty and, therefore, there is a point of law involved on the construction of the document." Their Lordships' first task is therefore to enquire, in view of the concurrent findings arrived at in India, whether a question of law is involved, and, if so, what it is. Though, no doubt, the meaning of some of the entries, if it arises, is a matter of some difficulty, it does not follow from that alone that the case raises any point of law.

The question whether a certain sum was paid before a certain date, or then remained unpaid, is in itself a mere question of fact. The question what it was paid for, if it was paid at all, is *prima facie* a question of fact also. This is equally so whether an oral statement or a written record was made about it or whether an inference has to be drawn from the circumstances of the payment. It is only when the legal obligation as to the date of payment is brought into question, that the question becomes one of law at all. Again, the mere fact that a writing has to be read and understood in order to determine the answer to the question, does not of itself make the question one of law. Entries in books of account are in themselves only narratives of monetary transactions, expressed by arranging figures in a particular way for the purpose of showing the result of a series of payments and receipts or other similar transactions. Under the common law rules of evidence, the person who kept an account was entitled to refresh his memory by looking at it, and then to narrate as his testimony by word of mouth the transactions therein summarised and the result of them in money. Specific legislation has made certain books of account evidence in themselves but, so far as the distinction between questions of law and questions of fact goes, they remain written narratives of particular events that have happened, and in themselves they stand on the same footing as other narratives. Their meaning has to be got at just like the statement of any living witness by considering what is said and the manner of saying it, but no question of legal construction arises. So far, books kept in the ordinary course of business are all alike; they raise questions of fact, whether they are diaries, call books, cash books or postage books, and they have to be weighed as other proved facts are.

The *jama-wasil-bakis* were not all kept in the same way. The extracts from the second and third sets were on forms printed and ruled on the same plan. First to the left came a

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column for dates; then a column for the number of the corresponding chalan. It was common ground that the date to be entered was the date of a payment. It is, however, to be observed that no receipts were produced by the plaintiff nor any duplicates of such receipts by the defendants, nor was this omission remarked upon in the Courts below. Then came three columns, headed respectively, Demand, Collection, and Balance, and each had three sub-divisions headed "arrear," "current," and "total." The "collection" column had a further fourth sub-division headed "Advance collection of the previous year." After these three columns, Demand, Collection, and Balance, came another headed "Excess collection."

The Subordinate Judge, who was affirmed in this respect on appeal, points out that for the year 1907-1908, with which the second set of extracts begins, no sum is entered under the column "demand" and its subordinate column " arrear," and that, starting with this as marking a point at which all payments had been made within time and nothing was left unpaid, the *jama-wasil-baki* entries show, in the nine years, beginning 1907-1908 and ending with 1915-1916, ten payments of Rs. 4-7-6, of which the last is carried on from the "collection" column to the "Excess collection" column following, and, as a payment in advance, would prevent any claim for arrears arising, when, on the regular pay-day, no further sum was forthcoming. If so, ten times Rs. 4-7-6 had been paid and were available for the rents falling due in the ten years previous to the date and satisfied them. It is asked, "If that was the state of the case, how could the Collectorate officials have allowed a sale for non-existent arrears to take place?" It may equally be asked in reply, "If he had not paid his last year's rent, how could the tenure-holder of a mahal, worth Rs. 38,000, let it go to a sale for default of Rs. 4-7-6?" Opinions may differ as to the balance of likelihood of error on one side or the other, but this at least is clear; both questions are questions of fact.

There is, however, some further material on the face of the *jama-wasil-bakis*. At the end of the second set of extracts below the final entry for 1915-1916—"Excess collection Rs. 4-7-6"—there is added, but when, why, or by whom is not known, "Current for 1322 B S. up to July, 1916," and then follows, "Rs. 4-7-6" under each of the three columns headed "Demand—current," "Demand—total," and "Collection—advance collection of the previous year." On turning, however, to the beginning of the third set of extracts there appears a

new heading in substitution for the "1915-1916," etc., entries of the previous set, namely, "Rent for 1323 B.S., of which latest date for payment of arrears is 28th July, 1917," and Rs. 4-7-6 is entered in the "Demand—current" column, Rs. 4-7-6 in the "Collection—arrear" column, nothing in the "Excess collection" column, and in the first column, which is for dates of payment, 26—3—18 is entered in a line with the Rs. 4-7-6 in the "Collection—arrear" column. It would appear that some one had been for some reason making entries, which would introduce into the third set of *jama-wasil-baki* entries a new element, namely, the Bengal style, and that somehow there was inserted at the end of the second set an entry, which states an arrear for 1915-1916, although the completed entry for 1915-1916 states an "excess collection" for that year to be carried forward, while at the same time the opening entry of the third set fails to carry this "excess collection" forward and describes the payment made on 26th March, 1918 as a collection on account of an arrear. The Trial Judge, who had framed his eighth issue thus, "Was the revenue for the year 1323 in arrears?" says on this:

"It appears from Ex. 5 that rent due up to 1321 (corresponding to 1914-15), which was due on the 28th June, 1915, had been paid up in the course of the year 1321, i.e., on the 16th September, 1914. In the course of the year 1322 (1915-16) rent for two years was paid, but of this Rs. 4-7-6, for one year was credited to the rent of 1322, due on the 28th June, 1916, and the balance, Rs 4-7-6, was kept, as excess, for the year 1323, which became due on the 28th June, 1917. This excess ought to have been credited to the revenue for the year 1323, and then there would have been no arrears due for the year 1323."

In the High Court the same view, namely, that a book-keeping error had occurred, was also taken.

"It appears from the *jama-wasil-baki* (Ex. 5) that the revenue due for 1321 (1914-15), due on the 28th June, 1915, was paid up on the 16th September, 1914; so there was no arrear for 1321. There were two payments made in 1322, one of which (Rs. 4-7-6) was credited to the demand for 1322 (due on the 28th June, 1916), and the other (Rs. 4-7-6) shown as excess collection. That being so, the excess collection should have been credited to 1323 and there would then be no arrear for 1323."

How, then, are these findings of fact got over? The present appellants had put in the extracts and had relied on them at the trial as being presumptively correct, but they have sought in argument to read them in a manner different from that adopted in the Courts in India, as follows: Though the first two sets of extracts from the *jama-wasil-bakis* purport to be based on the years of the Christian calendar, the question still

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remains, "What is the year of which they speak? Is it the year of demand by the Collector, or is it the year which, commencing with the 6th July, the commencement date of the *kabuliyat* contains a 28th July, even though the tenure-holder's year of occupation is then still current?" This question might have been answered in a moment, either by calling a competent witness from the Collector's office or by producing the *jama-wasil-baki* entries from the date of the *kabuliyat* in 1872, instead of only from 1899. Probably the knowledge of the matter possessed by the Trial Judge was sufficient to make it idle to do either. At any rate, the matter is not dealt with by any special evidence, and the Trial Judge says:

"In order to ascertain whether there was any arrear due for the year 1323, it is necessary to see how the years in this particular case should be calculated. It appears very clear from the defendants' document (Ex. A-2) that the rent for the Bengali year 1323 was due on the 28th June, and the last date of payment fixed by the Collector was the 28th July, 1917. This is quite in keeping with the *kabuliyat* (Ex. C), which is dated the 6th July, 1872 . . . . In practice also the rent appears to have been realised according to the Bengali year, with this modification, that the rent for a Bengali year becomes due on the 28th June, *i.e.*, some day of Assar of the next Bengali year."

The judgment of the High Court in concurring with this conclusion says:

"The rent for 1872 could not possibly have been intended to be paid on the 28th June, 1872, when the *kabuliyat* was executed on the 6th July, 1872."

Accordingly, both Courts read the revenue extracts as regularly referring to a year, which, in view of the sums recorded as having been paid, was not consistent in fact with any arrears at the material date.

The appellants then contended that, if this was the effect of the revenue records, the records were wrong and cannot be used to deprive them of a legally established right (*Balkishen Das* v. *Simpson*[1]). They further sought to meet the double finding as to the year referred to in the *jama-wasil-bakis* by drawing attention to the dates, at which payments were entered as having been made, and by submitting thereon, in substance, the following dilemma: "Either the year in the *jama-wasil-bakis*, headed 1915-1916, or whatever it might be, was the year of our Lord, in which a pay day on the 28th July fell after completion of a year's occupation, so that a payment then made

1. (1898) L.R. 25 I.A. 151 at 158, 159. I.L.R. 25 C. 833 (P.C.).

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would, in the example taken, be a payment for the year 1914-1915, and there would be an accrued arrear before the sale took place, or the respondent and his predecessors, all Bengali tenure-holders, had been in the habit of paying their revenue dues before, and sometimes considerably before, the date at which they first became due and exigible, *quod est absurdum.*"

The entries on which this contention is founded were, of course, before the Courts in India, and presumably were taken into consideration by them. It may be admitted that a practice of payment in advance, generally though not always observed, is surprising, but it is surprising in fact; not as matter of law. Unless it could be shown to be so far *contra naturam* as to necessitate in law some specific inference governing the effect of the evidence, the question still remains one of fact. Is there, however, anything so incredible about it? After all, the annual sum due was but small and the value of the mahal was such as might well make prepayment or post-payment a matter of indifference, depending on convenience and sometimes resulting in indisputable arrears. Their Lordships are unable to see here any question of law separable from the conclusion of fact drawn from the evidence in India, namely, that for the ten preceding years, whether by payments in advance or not, ten payments of the annual *jama* had been duly made. Until that finding is displaced, the construction of the *kabuliyat,* as to the date when the obligation to pay arose, does not become material, and, indeed, as it only renews an older *jama* Rs. 4-7-6, which dated at any rate from 1846, a construction of these summary instruments without regard to the practice customarily observed, would be inconclusive and at most would raise only one of those questions of construction of private instruments, which, it has been said, does not truly raise a question of law.

The appellants finally cited as a relevant authority the case of *Chaudhri Satgur Prashad* v. *Kishore Lal*[2] and contended that, because the *jama-wasil-bakis* were documents and were somewhat obscure, their introduction in evidence raised a question of law, which took the appeal out of the general rule as to concurrent findings. In their Lordships' opinion that decision has no bearing upon the present case. Special documents, which were either themselves documents of title or were statements intended to have effect as claims, compromises, or surrenders of legal rights, were there the material, from which an inference had

2. (1919) L.R. 46 I.A. 197: I.L.R. 42 A. 152: 38 M.L.J. 259 (P.C.).

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been drawn in the Indian Courts, and, in the opinion of their Lordships' Board, their special character assimilated the questions which they raised to questions intrinsically of law. There is no such feature here. The facts stated in the *jama-wasil-bakis* are materials from which, when their purport is gathered, the inference of fact is finally to be drawn, namely, whether or not certain and sufficient payments had been made and made in time. Errors in those accounts, and obscurity in the mode of keeping them and of posting the amounts mentioned, are no more than similar errors and obscurities would be in oral testimony, and present the same difficulties in drawing a conclusion, but that conclusion, when once it is arrived at, is one of fact and no question arises of legal problems turning on the construction of legal instruments. Nor does it avail to say that there is no error shown on the face of the accounts, and that the system on which they have been kept and the result which they show are quite plain, for that is not to state a question of law, but to disagree with the Indian Courts *in toto* on a matter of fact.

Their Lordships, being thus precluded from reviewing the concurrent findings of the Courts in India, need say no more with regard to the facts, except that they are not to be understood as expressing any doubt of their correctness. They will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Downer & Johnson.*

Solicitors for respondents: *Chapman, Walker & Shephard.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

R. Ratnasabapathy Chettiar and others .. *Plaintiffs**

v.

V. Devasigamony Pillai .. *Defendant.*

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Limitation Act (IX of 1908), Arts 66, 67 and 116—Decree on registered mortgage deed—Sale of mortgaged property in execution—Deficiency—Suit to recover balance under the personal covenant in the deed—Limitation

*C.S. No. 145 of 1925. 2nd November, 1928.

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Where, upon a sale of the mortgaged property under a mortgage decree obtained in a suit on a registered mortgage deed, there is a deficiency, the period of limitation to recover the same under a personal covenant in the said deed is six years under Article 116 of the Limitation Act and not three years under Article 66 or Article 67 of the Act

Ram Din v. *Kalka Prasad,* (1884) I.L.R. 7 All. 502: L.R. 12 I.A. 12 (P.C) and *Ganesh Lal Pandit* v. *Khetramohan Mahapatra,* (1926) I.L.R. 5 Pat. 585: L.R. 53 I.A. 134: 51 M.L.J. 82 (P.C.) explained and distinguished.

Tricomdas Cooverji Bhoja v. *Gopinath Jiu Thakur,* (1916) I.L.R. 44 Cal. 759: L.R. 44 I.A. 65: 32 M.L.J. 357 (P.C.) applied.

When the case came on for hearing in the first instance, the Court made the following

ORDER. *Beasley, J.*—In view of the decision of the Privy Council in *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*[1] and also in view of the numerous decisions in the Indian Courts which take a view contrary to what appears to have been taken in the Privy Council, I am referring the following question to a Full Bench: Beasley, J.

"Where, upon a sale of the mortgaged property under a mortgage decree obtained in a suit on a registered mortgage deed, there is a deficiency, what is the period of limitation to recover the same under a personal covenant in the said deed?"

My reason for referring this question is, that it is extremely doubtful whether the Privy Council in *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*[1] really had to decide this question which seems to have been unnecessary for the purposes of that decision.

K. S. Krishnaswami Aiyangar (with him *P. S. Ramaswami Aiyangar*) for plaintiffs.—The question is : what is the period of limitation for a suit to enforce a personal covenant in a mortgage? The mortgage in question was executed on 2nd February, 1918, the amount being payable in 24 months, *i.e.,* on 2nd February, 1920. The suit was filed on 19th February, 1925, *i.e.,* more than three years but less than six years of the date fixed for payment. The sale was held on 4th January, 1928. But it fetched only a small amount and a very large amount remained to be realised.

The question is whether the personal remedy is barred. *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*[1] is quoted as being a decision against me. It is said that that case decides that the period is only three years under Art. 66. But I submit that it decides no such thing. It was not at all necessary in that case to decide this point and the point never arose

1. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C.).

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for decision. The suit there was brought more than 10 years after the cause of action had arisen. So also the case in *Ram Din* v. *Kalka Prasad.*[2] These two cases are not applicable to the present case.

Counsel then read extracts from the two decisions and cited *Miller, Official Assignee* v. *Runga Nath Moulick.*[3] This holds that the period is six years. This is quoted with approval in *Ganesh Lal Pandit* v. *Khetramohan Mahapatra.*[1] So it has to be taken that the Privy Council did not intend to lay down the contrary rule. The portion where they say that the three years' rule governs is only *obiter*. I contend that Art. 116 is the article applicable. Art. 66 is only relevant to show the starting point of limitation. The two articles have to be taken together for this purpose. (Appeals Nos. 100 and 101 of 1925 since reported in *Chengalamma Garu* v. *Veeraraghava Naidu*[4] is in my favour.)

V. V. Srinivasa Aiyangar (with him *T. N. Seshachala Aiyar*) for defendant.—*Ganesh Lal Pandit* v. *Khetramohan Mahapatra*[1] contains an express ruling on the point, and it was necessary for the decision of the case. Art. 116 cannot apply to a personal covenant in a mortgage-deed.

In the corresponding section 117 of the Act of 1871 the word 'compensation' was absent, and the introduction of that word makes all the difference. Art. 66 alone applies and the period is only three years.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—The question referred to us for decision is the period of limitation applicable for the recovery of money due under a personal covenant contained in a registered deed of mortgage where the mortgage property has been sold and the claim is for the deficiency, whether the proper article to be applied is Art. 66 or Art. 67 as the case may be of the First Schedule of the Limitation Act or Art. 116 of the same schedule.

Art. 66 applies to cases on a single bond where a day is specified for payment and the period of limitation is three years computed from the day so specified. Art. 67 applies to cases on a single bond where no such day is specified, the period of

1. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C.).
2. (1884) I.L.R. 7 A. 502: L.R. 12 I.A. 12 (P.C.).
3. (1885) I.L.R. 12 C. 389.
4. (1928) 55 M.L.J. 506.

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limitation being three years computed from the date of the execution of the bond.

A single or simple bond is a bond merely for the payment of a certain sum of money without any condition in or annexed to it (Halsbury, Vol. III, p. 80). In *Dixon, Heynes* v. *Dixon*[5] the distinction between single and double or double or conditional bond is pointed out by Collins, L.J. (at page 582).

Article 116 provides for cases of compensation for the breach of a contract in writing registered, the period of limitation being six years commencing from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered. It is necessary therefore in order to ascertain the period of limitation to refer to the corresponding articles applicable to unregistered documents evidencing contracts.

It is contended by Mr. Krishnaswami Aiyangar for the plaintiff-mortgagee that where a contract between the parties whether for payment of a fixed or an ascertained sum or not is reduced to writing and registered, Art. 116 is applicable even though the case may fall under Art. 66 or Art. 67 and that the words "compensation for the breach of a contract" include a claim for an ascertained sum of money payable under a contract.

Mr. Srinivasa Aiyangar for the defendant contends that Art. 116 has no application to suits for the recovery of an ascertained sum of money due on a bond, that even if it did, the article could only apply to cases not provided for specifically by any of the other articles, that where the question is as to which of two articles of the Limitation Act is to be applied, the more particular and specific article should be regarded as the article which has to be applied and that as Arts. 66 and 67 make specific provision for the recovery of money due on a single bond, there is no scope for the application of Art. 116.

I am of opinion that Art. 116 is the proper article to be applied.

Art. 115 refers to suits for compensation for the breach of any contract, expressed or implied, not in writing registered and not herein specically provided for; and the period of limitation is three years to run from the time when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.

In the next article, Art. 116, the words "and not herein specially provided for" are omitted and the starting period is

5. (1900) 2 Ch. D. 561.

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to be taken as the period when time will begin to run if the contract was not registered.

The omission of the words "and not herein specially provided for" in Art. 116 is, I think, significtnt.

The contentions of Mr. Srinivasa Aiyangar have been negatived in a series of decisions of all the High Courts in India and Art. 116 has been applied to suits for payment of rent under registered rental agreements, to suits on registered deeds of partnership, to suits on registered simple bonds, to suits on registered agreements to pay dower and to suits for the recovery of the balance due on registered mortgage bonds after the sale of the mortgage properties.

In *Vythilinga Pillai* v. *Thetchanamurthi Pillai*[6] it was held by Kindersley and Muthuswami Aiyar, JJ., that Art. 116 of the second schedule of the Limitation Act governs a suit to recover arrears of rent payable on a registered contract. After pointing out that the words "not otherwise provided for" which occur in Art. 115 do not occur in Art. 116 and that the period of limitation is to commence when the period of limitation would begin to run against a suit brought on a similar contract not registered, the learned Judges observe :

"These terms appear to us large enough to cover contracts for payment of rent, as well as other contracts when in writing registered. It was argued that a suit for arrears of rent was not a suit for 'compensation' for breach of contract. But 'compensation' is the general term used also in the Indian Contract Act, S 73, to denote payment which a party is entitled to claim on account of loss or damage arising from breach of contract. The effect in this place is to exclude suits for specific performance."

In *Magaluri Garudiah* v. *Narayana Rungiah*[7] it was held by Sir Charles Turner, C. J., and Muthuswami Aiyar, J., that Art. 116 applies to a suit on a registered bond to pay a certain sum of money in instalments. The learned Judges overruled the plea of limitation on the ground that the bond was registered. They observe:

"The plea of limitation cannot be sustained, the bond was registered, and the ruling of the Judge as to the article in the Limitation Act which governs suits for the recovery of moneys payable under such instruments is supported by the decision of this and the other High Courts."

In *Ranga Reddi* v. *Chinna Reddi*[8] Muthuswami Aiyar and Shephard, JJ., held that a suit to recover an amount due in respect of covenants in a registered deed of partnership was govern-

6. (1880) I.L.R. 3 Mad 76. 7 (1881) I.L.R. 3 Mad. 359
8. (1891) I.L.R. 14 Mad. 465: 1 M.L.J. 482.

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ed by Art. 116 and not by Art. 64. After referring to the fact that the contract of partnership contained an express stipulation as to the payment of losses and that the origin of the obligation in the suit was the registered contract, the learned Judges observe:

"It was argued that Art 64, the article relating to suits on accounts stated, should be applied. That would be so, if the partnership contract had not been registered, but that circumstance renders Art 116 applicable, as in the case of a suit against an agent it was held that the general Arts. 88 and 89 would not govern the suit, because the agreement with the agent was registered. (*Harender Kishore Singh* v. *The Administrator-General of Bengal*[9]). It was also held in *Vythilinga Pillai* v. *Thetchanamurthi Pillai*,[6] that in a suit for rent founded on a registered agreement the same Art. 116 and not Art. 64 should be applied. The intention was to extend the period in favour of suits to enforce obligations based on registered instruments."

In *Nobocoomar Mookhopadhaya* v. *Siru Mullick*[10] it was held by Sir Richard Garth, C. J., and Mitter, J., that a suit to recover money due on a registered bond is a suit for compensation for breach of contract in writing registered and fell within the meaning of Art. 116 of the Limitation Act. In *Umesh Chunder Mundul* v. *Adarmoni Dasi*[11] it was held that a suit to recover arrears of rent due under a registered rental agreement is governed by Art. 116, though Ghose, J., felt some doubt on the question whether a suit for the recovery of arrears of rent on an agreement in writing registered is a suit for compensation for breach of a contract within the meaning of Art. 116, but he felt bound by the various rulings of the different High Courts as to the construction to be put upon Art. 116.

In *Din Doyal Singh* v. *Gopal Sarun Narain Singh*[12] it was held by Trevelyan and Banerjee, JJ., that Art. 116 of the Limitation Act applied to a suit on a registered instalment bond and not Art. 74 which in express terms makes provision for instalment bonds. The learned Judges observe:

"We think that Art. 116 is intended to apply to all contracts in writing registered, whether there is or is not an express provision in the Limitation Act for similar contracts not registered, and this view seems confirmed by the distinction between the terms of this article and of Art. 115, in which the words 'not herein specially provided for' occur."

In *Asiatulla* v. *Danis Mohamed*[13] it was held that a suit to recover dower fixed by a registered instrument was governed by Art. 116 of the Limitation Act.

6. (1880) I.L.R. 3 Mad. 76.
9. (1885) I.L.R. 12 C. 357.
10. (1880) I.L.R. 6 C. 94.
11. (1887) I.L.R. 15 C. 221.
12. (1891) I.L.R. 18 C. 506
13. (1922) I.L.R. 50 C. 253.

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In *Mahamad Masaharal Ahad* v. *Mahamed Asimuddin*[14] the question as to whether a dower debt under a registered instrument is governed by Art. 116 or by Arts. 103 and 104 is discussed at great length and all the authorities on the subject have been reviewed, and it was held by Mookerjee and Rankin, JJ., that Art. 116 applied to such suits and that Arts. 103 and 104 would not apply when there is no registered instrument.

In *Husain Ali Khan* v. *Hafiz Ali Khan*[15] it was held by a Full Bench of the Allahabad High Court that a suit on a registered bond for the payment of money was governed by Article 116. This view is followed in *Khunni* v. *Nasir-ud-din Ahmad*[16] and the subsequent decisions of the Allahabad High Court. A similar view was taken in *Ganesh Krishn* v. *Madhavrav Ravji*,[17] where it was held that a suit to recover a specific sum of money due on a registered bond or other written contract was a suit for compensation for breach of contract and fell within the meaning of Art. 116. In *Lalchand Nanchand* v. *Narayan Hari*[18] it was held that Art. 116 applied to suits for debts or sums due on registered documents, and *Ram Narain* v. *Kamta Singh*[19] was not followed.

The same view was taken in *Dinkar Hari* v. *Chhaganlal Narsidas*.[20] There the suit was to recover money on a registered document which was invalid as a mortgage for want of proper attestation and had therefore to be treated as a bond for the recovery of money on personal covenant. It was held that the case was governed by Art. 116 and not by Art. 66.

A contrary view was taken in *Ram Narain* v. *Kamta Singh*[19] and this case was followed in *Jaggi Lal* v. *Sri Ram*,[21] but this view was not approved by their Lordships of the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*.[22]

The decision of their Lordships of the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*[22] puts the applicability of Art. 116 to cases of registered bonds for payment of asertained sums of money beyond controversy. The

14. (1922) 27 C.W.N. 210.
15. (1881) I.L.R. 3 All. 600 (F.B.).
16. (1881) I.L.R. 4 All. 255.
17. (1881) I.L.R. 6 B. 75.
18. (1913) I.L.R. 37 B. 656.
19. (1903) I.L.R. 26 A. 138.
20. (1913) I.L.R. 38 B. 177.
21. (1912) I.L.R. 34 All. 464.
22. (1916) I.L.R. 44 C. 759: L.R. 44 I.A. 65: 32 M.L.J. 357 (P.C.).

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suit arose out of a registered lease deed in respect of certain coal lands which provided that the lessee should pay a minimum royalty of Rs. 4,000 per annum by four equal instalments subject to certain conditions which it is unnecessary to refer to. A suit was filed to recover the royalties due under this document. The plea of limitation was raised as the claim covered the rent due for more than three years. The High Court held that the whole amount claimed was recoverable as the case fell within Art. 116 of the Second Schedule of the Limitation Act. On appeal to the Privy Council, their Lordships upheld the decision of the High Court. Lord Sumner after referring to the Limitation Acts of 1859, 1871 and 1877 observes:

"Both these Acts draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case 'compensation for the breach of a contract' points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other hand it has been pointed out that 'compensation' is used in the Indian Contract Act in a very wide sense, and that the omission from Art. 116 of the words, which occur in Art. 115, 'and not herein specially provided for,' is critical. Art. 116 is such a special provision, and is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds. They begin in 1880, and are to be found in all the Indian High Courts. In spite of some doubts once only was it held in 1903 (*Ram Narain* v. *Kamta Singh*[19]), that in such a suit Art. 110 and not Art. 116 applied. Then in 1908, and in this state of the decisions, Act IX of 1908 replaced the Limitation Act of 1877 without altering the language or arrangement of the articles and in 1913, in *Lalchand* v. *Narain*[18] the High Court of Bombay held that, especially in view of this re-enactment, the current of decisions must be followed, and *Ram Narain's Case* must be disapproved. In the present case the High Court treated the matter as settled law in the same sense.

Where the terms of a statute or ordinance are clear, their Lordships have decided that even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the meaning of the enactment. (*Pate* v. *Pate*[23]). Such is not the case here. However arguable the construction of Act XV of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction, for which the appellant argues, was ever clearly right. On the contrary, their Lordships accept the interpretation so often and so long put

18. (1913) I.L.R. 37 B. 656. 19. (1903) I.L.R. 26 A. 138.
22. (1916) I.L.R. 44 C. 759: L.R. 44 I.A. 65: 32 M.L.J. 357 (P.C.).
23. (1915) A.C. 1100.

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upon the statute by the Courts in India, and think that the decisions cannot now be disturbed."

Turning to mortgages, it is difficult to see how if a claim for arrears of rent on a registered bond can fall within Art. 116, a claim for money due on a personal covenant in a mortgage document would not equally be governed by Art. 116.

On this question again there has been a uniform course of decisions. It has been held by all the High Courts that where Art. 132 applies to a claim to enforce payment of money charged on immoveable property by a sale of that property, Art. 116 governs a case where the suit is to recover the deficiency arising out of such sale.

In *Rama Rao* v. *Veda Aiyar*[24] it was held that a registered mortgage deed which was inoperative as against the land comprised in the mortgage was good as regards the personal covenant to pay the mortgage money and enabled the mortgagee to sue for it within six years as provided by Art. 116 of the Limitation Act.

I may also refer to *Chengalamma Garu* v. *Veeraraghava Naidu*[4] where a similar view was taken by myself and Reilly, J., and to *Rathnasami* v. *Subramania*,[25] where it was held that Art. 116 applies to a suit to recover a mortgage debt due on a registered bond (*see* the observations of Sir Arthur Collins, C.J. and Muthuswami Aiyar, J., at page 59).

In *Unichaman* v. *Ahmed Kutti Kayi*[26] it was held by Subramania Aiyar and Benson, JJ., that a suit to recover money lent on a kanom which they treated as usufructuary mortgage owing to the mortgagor's failure to put the mortgagee in possession was governed by Art. 116.

The same view has been taken by the Calcutta High Court in a series of cases.

In *Miller* v. *Runganath Moulick*[3] it was held that a claim to recover money due on a personal covenant in a mortgage bond was not governed by Art. 132 but by Art. 116. This case was referred to with approval by their Lordships of the Privy Council in *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*[1] which I shall refer to later on.

1 (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C.).
3. (1885) I.L.R. 12 C. 389.
4. (1928) 55 M.L.J. 506.
24. (1922) I.L.R. 46 M. 435: 44 M.L.J. 373.
25. (1887) I.L.R. 11 M. 56.
26. (1897) I.L.R. 21 M. 242: 8 M.L.J. 81.

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In *Joginder Mohun Chatterjee* v. *Bhoot Nath Ghosal*[27] it was held by Ameer Ali, J., that where a deed of mortgage is ineffectual owing to registration by a Registrar having no jurisdiction over the property, the liability on the personal covenant is governed by Art. 116. The learned Judge after finding that the Sub-Registrar had no jurisdiction over the property observes:

"If I am right in that conclusion, it follows that the document cannot take effect as a mortgage deed; but, as it is registered, although the suit has been brought more than three years after the date of the execution, the claim is not barred as was contended for by the defendant's counsel."

In *Rahmat Karim* v. *Abdul Karim*[28] it was held by Sir Francis Maclean, C.J., and Holmwood, J., that Art. 116 applies to a personal covenant to pay under a registered deed of mortgage.

A similar view was taken in *Raja Ram Narain Singh* v. *Odindranath Mukerjee*.[29]

The Allahabad High Court has also taken the same view in a series of cases.

In *Naubat Singh* v. *Indar Singh*[30] it was held that a suit by a mortgagee to recover money due on a registered mortgage bond is governed by Art. 116 of the Limitation Act. The observations of the learned Judges at page 204 are clear.

In *Collector of Mirzapur* v. *Dawan Singh*,[31] a suit to recover money due on a registered mortgage bond payable in instalments was held to be governed by Art. 116.

In *Shib Dayal* v. *Meharban*,[32] a Full Bench of the Allahabad High Court accepted the view that a suit on a personal covenant in a registered mortgage bond was governed by Art. 116. The learned Judges observe at page 36:

"In fact there is a uniform course of decisions in all the High Courts that Art. 116 of the Limitation Act would be applicable to a mere money claim based on a registered bond, 'and not the general Art. 120'"

It thus appears that all the High Courts have held that Art. 116 of the Limitation Act governs suits to recover money on a personal covenant in a registered bond or deed of mortgage. I have referred to the decisions in detail and to the views of the eminent Judges of the various High Courts as it is argued that these decisions have been overruled by the decisions of their

27. (1902) I.L.R 29 C. 654.
28. (1907) I.L.R 34 C. 672.
29. (1911) 17 C.W.N. 369.
30. (1890) I.L.R. 13 A. 200
31. (1908) I.L.R. 30 A. 400.
32. (1922) I.L.R. 45 A. 27 (F.B.)

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Lordships of the Privy Council in *Ram Din* v. *Kalka Prasad*[2] and *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*,[1] which compel us to hold that notwithstanding the current of authority, the three years' rule applies even in cases of registered mortgage documents.

I am of opinion that neither of these cases is authority for the view contended for.

In *Ram Din* v. *Kalka Prasad*[2] the contention was that Art. 132 applied even to cases where the claim was on the personal remedy. In that case the mortgage deed was dated the 25th of January, 1870, and the amount was repayable on the 13th of June of the same year. There was another mortgage for Rs. 900 and both the deeds contained a personal covenant to pay. Suits were instituted on the 21st and the 23rd August, 1880, on the two mortgage-deeds. In both the suits, the contention was that no decree can be passed against the defendant personally as more than six years had elapsed from the date of the execution of the bonds. The Subordinate Judge upheld the contention and passed a decree only for the sale of the mortgage property which was governed by Art. 132 of the Limitation Act. The District Judge reversed the decision of the Subordinate Judge and held that Art. 132 applied both to the remedy by sale and the personal remedy. But the High Court reversed the decision of the District Judge and upheld the decision of the Subordinate Judge. The argument in the Privy Council was that Art. 132 applied to both the remedies, and this was negatived by their Lordships of the Privy Council. Their Lordships at page 505 observe:

> "A period of nearly 10 years elapsed from the time at which the mortgage money with interest became payable before the suit was instituted. The question submitted for their Lordships' consideration is whether, the lesser period of limitation, three or six years as the case may be, has barred the personal remedy against the mortgagee even though the mortgage remains in full force, as against the mortgaged property."

It is significant that their Lordships use the expression "three or six years as the case may be" which obviously has reference to whether the document is registered or not. Then their Lordships go on to consider the effect of Art. 132. Later on their Lordships refer to six years' limitation with regard to suits on foreign judgments and some compound registered securities. Their Lordships were dealing with the Limitation Act IX of 1871 and I can see nothing in this decision which is

1. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C.).
2. (1884) I.L.R. 7 A. 502: L.R. 12 I.A. 12 (P.C.).

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authority for the view that even as regards registered mortgages the period of limitation is three years. The suit was filed 10 years after the cause of action arose and the only contention was that Art. 132 applied and gave the plaintiff a period of 12 years even as regards personal remedy. And it was this argument that was repelled by their Lordships.

Ganesh Lal Pandit v. *Khetramohan Mahapatra*[1] was also a case where a suit on a mortgage was instituted 10 years after the debt became payable, and there was no question as to whether the three or six years' rule applied as in either view the claim was over six years. The contention there also was that Art. 132 applied. The judgment was delivered by Mr. Ameer Ali and the statement in the judgment that

"in the case of *Ram Din* v. *Kalka Prasad*[2] it was held by the Judicial Committee that when a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realisation of the mortgage debt out of the mortgage properties, the claim would be barred in three years"

is with all respect too wide if it is taken to include both unregistered and registered mortgages. As I pointed out, their Lordships in *Ram Din* v. *Kalka Prasad*[2] used the expression "three or six years as the case may be."

I may also point out that their Lordships of the Privy Council refer to with approval *Miller* v. *Runganath Moulick*,[3] and the concluding portion of the passage which they cite from the judgment of the Calcutta High Court is to the effect that the personal liability has become barred as the suit was commenced more than six years after the accrual of the cause of action. The question was not whether Art. 66 or Art. 116 applied but whether Art. 132 applied as the suit was filed beyond the period provided for both by Art. 66 and Art. 116. It also appears from the statement of facts as set out in the judgment that the mortgage document was not executed in compliance with the provisions of the Registration Act. It appears that the mortgagor Suryamani executed a power of attorney in favour of one Lakhan on the 29th July, 1884, to execute and register the mortgage-deed and also a deed of sale and that it was registered on the 29th July, and that the mortgage and sale were executed on the 23rd July. Their Lordships of the Privy Council after referring to section 32 of the Registration Act agreed with the High Court in thinking that the sale-deed

1. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C.).
2. (1884) L.R. 12 I.A. 12: I.L.R. 7 A. 502 (P.C.).
3. (1885) I.L.R. 12 C. 389.

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was not validly executed. They also agreed with the High Court in thinking that

"the principal mortgage purporting to have been executed by Suryamani was not executed in compliance with the provisions of the law so as to make it binding on Suryamani."

I think that these facts show that the mortgage document in question was not properly registered and so was to be treated as an unregistered document and if this is so Art. 66 would be the article to be applied.

I may also point out in this connection that their Lordships have in two cases before them held that the six years' rule was applicable in cases of registered documents for payment of money.

In *Kameshwar Pershad* v. *Rajkumari Ruttan Koer*[33] the suit was to recover money due on a mortgage bond executed on the 1st of March, 1872 by one Rani Asmedh Koer whereby the money was repayable in September, 1875. She surrendered her estate to one Run Bahadur Singh on condition that he would pay her an allowance for maintenance and pay off her liabilities. A suit was filed by the mortgagee against the Rani and Run Bahadur Singh on the mortgage bond and it was held that the mortgage bond was not binding on Run Bahadur Singh. There was a prior litigation which went to the Privy Council. On the 13th January, 1887, the appellant instituted a suit to have him declared liable personally on the agreement between himself and the Rani to pay her debts, the contention being that the case was governed by Art. 132. Lord Morris observes:

"The first objection taken to the suit was that it was barred by the law of limitation.

Prima facie, this would be obvious, for the bond was by its terms made payable in the month of September, 1875, whereas the right to sue the defendant for a personal debt would be limited to six years, and the present suit was not commenced until the month of January, 1887, an interval of over 11 years. The appellant, however, alleges that he comes within the limitation applicable to a charge on immoveable property, which would be 12 years; if he is right in that contention, the suit, being instituted 11 years and some months afterwards, is not barred.

But it is necessary for the appellant to satisfy this Board that the charge upon the estate was one which was binding upon it, and, bearing in mind the facts of the earlier suit, and what was said by the Board in that case, their Lordships are not satisfied that it was so binding in fact. In this view, the period of six years, and not the period of 12 years, applies in this case, and the suit is consequently barred."

33. (1892) L.R, 19 I.A. 234: I.L.R, 20 C. 79 (P.C.).

F. B.

Ratnasabapathy Chettiar v. Devasigamony Pillai.

Kumaraswami Sastri, J.

In *Betia Maharani* v. *The Collector of Etawah* [34] the suit was by the plaintiff as the assignee of a registered bond. Lord Hobhouse in delivering the judgment of the Board observes:

"This appeal raises questions under the Indian Limitation Act, 1877. The suit is brought on a bond for Rs. 7,000 executed on the 20th June, 1876, by Lala Laik Singh, whose estate is now under the management of the Court of Wards, in favour of the firm of Gopalji Kishen Das. The plaintiff, who is now appellant, is assignee of the bond. The defendant, the Collector of Etawah, represents the Court of Wards.

The debt was made payable on the 1st November, 1876. Nothing has been paid on it. The suit was brought on the 6th November, 1888, more than 12 years after the date of payment. The term of limitation is six years; so that the plaintiff has to prove circumstances which interfere with this running of time."

Then his Lordship deals with the various circumstances and holds that those circumstances were not made out.

I have set out all the cases in detail and it seems to me that on the authorities as they stand the law is clear that the limitation is six years and that it would require a clear pronouncement of their Lordships of the Privy Council overruling the long course of decisions as to mortgages to enable me to hold that the period of limitation applicable is three years under Art. 66.

I do not think that the two cases *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*[1] and *Ram Din* v. *Kalka Prasad*[2] contain any such clear pronouncement of their Lordships of the Privy Council. On the contrary I do not think, having regard to the considerations which I have already set out, their Lordships had in mind the question which is at present in issue, namely, the applicability of Art. 66 or 116.

I would answer the reference by stating that the period of limitation is governed by Art. 116 where the claim is to recover money due on a personal covenant contained in a deed of mortgage.

N.S. *Reference answered.*

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1 (1926) L.R. 53 I.A. 134 I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C.)
2 (1884) L.R. 12 I.A. 12: I.L.R. 7 A 502 (P.C.)
34. (1894) L.R. 22 I.A. 31 : I.L.R. 17 A. 198 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

The Secretary of State for India in Council represented by the Collector of Tinnevelly. *Appellant** (*Deft.*)

v.

Sri Kuthalanathaswami Temple through its trustees (1) Subramania Pillai (resigned his trusteeship) and (2) Ramasamia Pillai .. *Respondents* (*Plffs.*).

Secretary of State for India v. Sri Kuthalanathaswami Temple.

Assessment—Government's right to levy—Agreement implied precluding—Evidence—Settlement register of 1874—Entry of property in, as "poramboke" and statement in remarks column thereof that it was "pagoda poramboke"—Effect—"Poramboke"—Land classified as—Assessment on—Government's right to levy—Easement—Right of—Acquisition of—Acts done to acquire right of ownership if can be relied upon for purpose of—Title—Admission in pleadings of—What amounts to.

The Sovereign power is entitled to levy assessment on all lands within its territory.

An entry in the settlement register of 1874 classifying certain land as "poramboke" and stating in the remarks column that the land was "pagoda poramboke" is a very slender basis for finding an implied agreement by Government not to levy assessment thereon.

By classifying a land as poramboke the Government does not relinquish the right to levy assessment on it for all time.

Where a man exercises acts of ownership he cannot have the *animus* necessary for acquiring an easement by the doing of those acts.

In a suit between a temple and the Government relating to property A, the Government filed a written statement which alleged that the only property to which the plaint temple was entitled was property B in the suit village and that the property in dispute in that suit was outside the survey number which comprised property B,

Held, that the allegation did not amount to an admission by the Government of the title of the temple to property B, so as to preclude it from thereafter contending that property B did not belong to the temple.

Appeal preferred against the decree of the Court of the Additional Subordinate Judge of Tinnevelly, dated the 3rd day of December, 1923, in O.S. No. 20 of 1919.

The Government Pleader for appellant.

T. Rangachariar, P. N. Marthandam Pillai and *A. Daivanayagam Pillai* for respondents.

*Appeal No. 181 of 1924. 21st March, 1928.

Secretary of State for India v. Sri Kuthalanathaswami Temple.

Phillips, J.

The Court delivered the following

JUDGMENTS. *Phillips, J.*:—This appeal relates to the Kuthalanathaswami temple at Kuttalam of which the plaintiffs (respondents) are the trustees. The suit is brought for a declaration that the plaint property belongs to the plaint temple and the Government has no right to levy any assessment on the same. The plaint property is Survey No. 482 of Kuttalam and the temple itself stands in this survey number. In 1874 the field was undivided and in the settlement register, Ex. V, it is classed as poramboke, while in the remarks column is the word "pagoda." The field itself is about 27 acres in extent. In the re-survey of 1908 the field has been sub-divided into 51 sub-divisions. The sites of the temple and of some mantapams and other buildings intimately connected with the temple have been left as poramboke, but in respect of the other sub-divisions the Government (defendant) issued inam pattas, but these pattas were refused and accordingly ordinary assessment has been levied on these items. The respondents' contention is that the Government has no right to alter the classification of the land or to levy any assessment thereon, and this contention has been upheld by the Lower Court. The temple claims the whole property as its own absolute property, but has no title-deed for the same. It is not easy to understand on what ground the Subordinate Judge has found ownership in the temple. The finding appears to be based on evidence of acts of ownership on the plaint property, but it is evidently not intended to be a finding that the plaintiffs have acquired a prescriptive right, for there is in the judgment no reference to these acts having been continued for over 60 years. In this Court Mr. Rangachari for the respondents has not attempted to make out any prescriptive right, but has based his argument on the ownership of the plaintiffs. It has long been recognised that the Sovereign power is entitled to levy assessment on all lands within its territory. So long ago as 1850 in *Maharajadheeraj Raja Mahatab Chund Bahadur* v. *The Bengal Government*[1] the principle was enunciated as being that the ruling power is interested in a certain proportion of the produce of every beegah, except so far as it shall have transferred, relinquished or compounded its right thereto, and all persons claiming the benefit of such exemptions being bound to establish their respective claims and titles. The same principle was affirmed in *Secretary of State for*

1. (1850) 4 M.I.A. 466 at 497.

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India v. *Bai Raj Bai*,[2] where at page 646 it was observed with reference to inhabitants in some territory ceded to the Bombay Government that

"the only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied or by legislation, chose to confer upon them."

We therefore start in this case with an assumption that the defendant has a right to levy assessment on all lands within his jurisdiction, including the plaint property, unless it can be proved that either by statute or by agreement the plaint property is exempt from liability. This principle was not disputed, and cannot be disputed, by the respondents, but it is contended that the evidence in the case is sufficient to prove an implied agreement between the Government and the plaintiffs (respondents) that the suit property is exempt from taxation. When we come to examine this evidence it appears to be based upon the entry in the settlement register of 1874 in which Survey No. 482 is classed as "poramboke" and is said in the remarks column to be "pagoda poramboke". This seems to be a very slender basis for finding an implied agreement not to levy assessment. Reliance is placed on a single observation in *Theivu Pandithan* v. *The Secretary of State for India*[3] where poramboke is referred to as follows :

"Poramboke . . . . is land which the Revenue Officers at the settlement considered was required for these public purposes and which should not, therefore, at any time, be granted on patta, and on which it was for this reason useless to fix any assessment"

This observation merely relates to the opinion of the Revenue Officers and is no authority for holding that by classifying a land as poramboke the Government relinquishes the right to levy assessment on it for all time. Poramboke is defined in Wilson's Glossary thus:

"Such portions of an estate or village lands liable to revenue as do not admit of cultivation and are therefore exempt from assessment."

a definition which was accepted by this Court in *Seshachala Chetty* v. *Chinnaswami*.[4] That definition shows clearly that poramboke is liable to revenue, but that the right to levy assessment on it is given up by the Government for certain reasons; but it does not follow that, if those reasons cease to exist, or are held to be inadequate, the Government cannot levy assessment if it so chooses. It was sought to support this alleged prohibition of assessment by Board's Standing Order No. 15,

2. (1915) L.R. 42 I.A. 229: I.L.R. 39 B 625: 29 M.L.J. 242 (P.C.).
3. (1898) I.L.R. 21 M. 433 (F.B.).
4. (1916) I.L.R. 40 M. 410: 32 M.L.J. (Sup.) 1 (F.B.).

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which, while restricting the grant of poramboke land, recognises that it may be assigned in certain cases. In the present case a large portion of Survey No. 482 has been occupied by private individuals unconnected with the temple, and has been utilised for purposes not intended to benefit the pagoda. Apparently, in 1874, the Government considered that the whole of Survey No. 482 should be reserved for pagoda purposes, and in 1908, finding that this reservation of the whole extent was either impossible or undesirable, decided to convert the land from poramboke to ayan and grant inam pattas in respect thereof. Pattas were offered to the temple trustees free of assessment, and consequently revested in them rights, which possibly they had lost by adverse possession, and it appears that the action taken by the Government was wholly in the interests of the temple itself. This appears from Ex. II, Board's proceedings, dated 15th June, 1907. The trustees, however, refused this generous offer and now sue to enforce their supposed rights.

The question then remains, can any agreement to forego assessment for all time be implied by the mere classification of the suit land as poramboke in 1874? The suggestion that the entry of the word "pagoda" in the remarks column means that the pagoda was the absolute owner of the poramboke must be rejected *in limine*. For instance, village site is classified as poramboke and also road, channels, tanks, etc., and we get these words entered in the remarks column, which shows that the words are merely descriptive and confer no title. So far as village site is concerned it was held in *The Taluk Board, Dindigul* v. *Venkataramier* [5] that such site was not vested in the villagers and that the Government could assign the same to other persons. That there was no agreement in 1874, or prior to it, is also clear from the inam settlement in 1864-65. A large extent of land (about 50 acres in extent) was confirmed as inam in favour of the plaint temple, but Survey No. 482 was not dealt with at that inam settlement. It appears from Exhibit II (paragraph 7 of Mr. Murdoch's letter, dated 3rd March, 1907) that a small portion of Survey No. 482 was classified as inam in 1814 and this was not confirmed in the Inam Settlement of 1864-65. If, as contended, there really had been a grant of this Survey No. 482, whether before or after the advent of British Rule, it is clear from the proceedings at the inam settlement that such grant was not recognised by the Inam Commissioner. That being so, it is impossible to presume from the

5. (1923) I.L.R. 46 M. 866: 45 M L.J. 333.

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classification of the land as poramboke in 1874 that there was an agreement by Government not to levy assessment on the land.

The only other evidence relied on by the respondents is Ex. Q (1) and this is a written statement filed by the appellants in O.S. No. 8 of 1902 in the Sub-Court of Tinnevelly in a suit between the present parties in respect of a certain land adjoining Survey No. 482—a dispute which was eventually compromised. The alleged admission is as follows:

> "The only property to which the plaint temple is entitled is Survey No. 482 in Kuttalam village and the properties in dispute are situated outside the said survey number."

It is contended that this amounts to a clear admission that Survey No. 482 was the absolute property of the present plaintiffs. When the nature of the suit in which this written statement was filed is considered, it is evident that this so-called admission was merely a pleading that the suit properties were not the property of the temple and that the temple's rights were confined to Survey No. 482 which had been classed as temple poramboke at the previous settlement. There is no admission that the Government had given up its rights over Survey No. 482. There is only a mere pleading that the plaint property in that suit was distinct from Survey No. 482, to which the plaint temple was entitled. There is no admission that the temple was entitled to the whole of Survey No. 482, nor is there any admission that the manner in which it was entitled was such as to deprive the Government of its prerogative of levying assessment. On this statement it is impossible to hold that the plaintiffs have established their ownership or any agreement by the Government not to levy assessment. That being so, the plaintiffs' whole suit must fail. It is therefore unnecessary to consider the argument put forward by the learned Government Pleader that the easement allowed by the Lower Court for items 6, 7, 38, 50 and 51 must in any case be disallowed as the plaintiffs had not pleaded any easement right but only ownership, and it is conceded for the respondents that in view of the Full Bench ruling in *Subba Rao* v. *Lakshmana Rao*,[6] this finding as to easement cannot be supported. The further question of limitation need not be discussed as, whether the suit is or is not within time, it must fail on its merits. The result is that the appeal must be allowed and the plaintiffs' suit dismissed with costs throughout.

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6. (1925) I.L.R. 49 M. 820 (F.B).

The memorandum of objections which relates to items 6, 7, 38, 50 and 51 must also be dismissed with costs.

Odgers, J.—This is a suit by two trustees of the Sri Kuthalanathaswami temple against the Secretary of State for a declaration that the plaint temple is entitled absolutely to certain properties free from assessment. The cause of action is said to have arisen in April, 1916 when the Government began to set up a title to the sites in question.

The survey number in dispute is 482 and its extent is 27 acres and odd. This is seen in Ex. V which is the survey and settlement register of the village of Kuttalam of 1874 where the survey number is described as poramboke of 27 acres in extent; no pattadar's name but the word "pagoda" appears in the remarks column. In 1905-6, as shown by Ex. VI, this number was sub-divided into a number of smaller plots consisting for our present purpose of (1) poramboke, which is the site of the temple buildings, and (2) inams with regard to the temple curtilage (*see* Ex. VI, the Re-Survey Register, pp. 90 to 94). In the remarks column the sub-divisions are very variously given as road, temple, channel, matam, etc. With regard to the temple properties the trustee of the temple is entered as the pattadar or inamdar. Inam deeds were offered to the trustees (Ex. XVI) and refused (Ex. III); the inam was cancelled by Government (Ex. IV) and ordinary dry assessment was levied (Ex. XX). It is contended for the temple that there is an implied lost grant whereby some Government or ruler at some time beyond the memory of man granted to this temple these 27 and odd acres to be held free of assessment. It is said that in 1874 by Ex. V the whole acreage is included as temple poramboke and this constitutes a kind of agreement or contract by Government that they will waive assessment on the whole extent of No. 482 for ever. It is of course not contended that Government has levied any assessment on the lands actually occupied by the temple buildings or those used in connection therewith. But it is said that as Ex. V refers to the whole extent as temple poramboke, Government has no right to treat any part of No. 482 as assessable. As has been remarked, the entry in Ex. V does not show any owner's name under the column headed "pattadar's name and number" but in column 15, the remarks column, appears the word "pagoda."

Poramboke is defined in Wilson's Glossary as

"such portions of an estate or village lands liable to revenue as do not admit of cultivation, and are therefore exempt from assessment as sterile or waste land, etc."

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This has been adopted judicially in *Seshachala Chetty* v. *Chinnaswami*,[4] which *inter alia* decided that excess *natham* may be transferred to ayan. As long ago as 1850 it was held in *Maharajadheeraj Raja Mahatab Chund Bahadur* v. *The Bengal Government*[1] that exemption from assessment must be strictly proved and in *Sam* v. *Ramalinga Mudaliar*[7] it is said that

"all lands are liable to pay land revenue unless they are exempted by statute or by any binding engagement between the Government and the landowner. The British Government were not bound to recognise the revenue-free grants of the previous Governments, though in practice they did recognise them."

This same point of view is emphasized by the Privy Council in *Secretary of State for India* v. *Bai Raj Bai*,[2] where their Lordships say:

"The only legal enforceable rights they (*i.e.*, ancestors of the plaintiffs) could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied or by legislation, chose to confer upon them."

See also *Vaje Singji* v. *Secretary of State for India*[8] also a decision of the Privy Council to the same effect and a decision of our own Court in *Hanumanlu* v. *Secretary of State*,[9] where the learned Judges say:

"If the plaintiff claims to hold the land free from the payment of such assessment as the Government may fix, he must show some grant exempting him from the payment of the ordinary assessment."

Section 2 (1) of Madras Act III of 1905 (The Madras Land Encroachment Act) declares that

"as to lands save also in so far as they are temple site or owned as house site or back-yard, they are and are hereby declared to be the property of Government."

Further

"the right of the Government to assess land to land revenue and to vary it is a prerogative right of the Crown to exact from a subject holding arable land its share of the produce or the equivalent of such produce" *Kelu Nair* v. *Secretary of State for India*[10]

It seems therefore that the proceeding of Government under Ex. VI was perfectly justified, especially as Baden-Powell points

1 (1850) 4 M.I.A. 466 at 497.
2. (1915) I.L.R. 39 B. 625 at 646 . L.R. 42 I A. 229 · 29 M.L.J 242 (P.C.).
4. (1916) I.L.R. 40 M. 410 at 465 : 32 M.L.J. (Sup) 1 (F.B.).
7. (1916) I.L.R 40 M. 664 at 667: 30 M.L.J. 600.
8. (1924) I.L.R. 48 B 613: L.R. 51 I.A. 357. 47 M.L.J. 574 (P.C.).
9. (1911) I.L.R. 36 M. 373: 22 M.L.J. 445
10. (1925) I.L.R. 48 M. 586 at 590: 49 M.L.J. 79.

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out in his "Land Tenures," p. 75 that the duration of a settlement is 30 years unless it can be said that the entry in the remarks column in Ex. V is to be taken to establish either the recognition of a lost grant, *i.e.*, a grant by some former ruler which has been lost or to evidence a contract or engagement by Government that it will always regard the whole extent of No. 482 as temple poramboke and therefore free from assessment. The remark "pagoda" seems to me merely to be a description of the poramboke just as one can have road or channel or cart track poramboke and not to afford evidence of either a recognition of a lost grant or a present engagement on the part of Government. Reference has been made to *Theivu Pandithan* v. *The Secretary of State for India*[3] to show the classification of lands in Tinnevelly. The fourth division is poramboke, *i.e.*, unoccupied waste that is not cultivable or assessed. Benson, J., then goes on to say:

"The poramboke is land required for village site, threshing floors, roads, banks of tanks, channels, etc. This is land which the Revenue officers at the settlement considered was required for these public purposes, and which should not, therefore, at any time be granted on patta, and on which it was for this reason useless to fix any assessment."

The learned Judge, therefore, does not say that this decision of the Revenue Officers was binding for all time and could not be reconsidered at the next settlement. Reference was made to *The Secretary of State* v. *Raghunatha Tathachariar*,[11] where Sadasiva Aiyar, J., points out that poramboke is often loosely used to mean whatever land does not yield revenue to Government and that a grant of poramboke must include unassessed waste which is not communal property. For the respondents much reliance has been placed on Ex. Q-1 which is said to be an admission by Government of the absolute ownership of the temple in these lands. Ex. Q-1 is a written statement of the Secretary of State in O.S. No. 8 of 1902 in the Court of the Additional Subordinate Judge at Tinnevelly. Paragraph 2 begins as follows:

"The only property to which the plaint temple is entitled is Survey No. 482 in Kuttalam village and the properties in dispute are situated outside the said survey number and have always been at the disposal of Government."

It is said that that litigation concerned the claim of the temple to the exclusive possession of the well-known Kuttalam Falls. The question is: Can these words be said to admit the

3. (1898) I.L.R. 21 M. 433 (F.B.).
11. (1912) I.L.R. 38 M. 108: 24 M.L.J. 31.

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Odgers, J.

absolute title of the plaintiffs to the whole of the extent of No. 482? In my opinion, they cannot. No. 482 was not in dispute in O.S. No. 8 and all that the words quoted can fairly be taken to mean is that any title which the defendants had in the lands adjoining the temple is confined to No. 482. In my opinion, it only means that the rights of the plaintiffs are confined within the four corners of No. 482 which is a very different thing from meaning that they are entitled to the whole extent of No. 482. The learned Additional Subordinate Judge has taken a curious view. He relies on the admission in Ex. Q-1 and the entry in Ex. V and considers the sub-divisions one by one and comes to the conclusion that with regard to the lands the temple has been exercising certain acts of ownership thereon and that they are therefore temple property. With regard to certain of the sub-divisions representing a road, the learned Judge somewhat curiously holds that the road does not belong to the temple but that the trustees are entitled to a "special right" of holding booths, etc., on festive occasions. With regard to the river (sub-division 50) he holds that the bed of the river belongs to Government, but that the temple has the right to the trees in the river-bed and also the ownership of the revetment on the western bank, and the customary rights of worship and approach at the river. These he describes as peculiar rights. With regard to these so-called special particular rights, there can be no argument. Admittedly the temple has been doing certain acts with regard to the road and river in their assertion of their alleged rights as owners. The rights reserved to them by the learned Additional Subordinate Judge can only be rights of easement. There is no issue as to any rights of easement and in the view I take on the main question, this discussion really does not arise. On that ground alone no such rights could be reserved to the plaintiffs on the facts and *Subba Rao* v. *Lakshmana Rao*[6] makes it perfectly clear that where a man exercises acts of ownership he cannot have the *animus* necessary for acquiring an easement by the doing of those acts. Again the acts of ownership attributed to the plaintiffs seem to me to be merely fugitive or intermittent and would not be such as to establish any effective possession as against the rights of Government. (See *The Taluk Board, Dindigul* v. *Venkataramier*.[5]) It, therefore, seems to me that the judgment of the learned Subordinate Judge is wrong and must be reversed.

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5 (1923) I.L.R. 46 M. 866: 45 M.L.J. 333.

6. (1925) I.L.R. 49 M. 820 (F.B.).

Secretary of State for India v. Sri Kuthalanathaswami Temple. Odgers, J.

A memorandum of objections has been put in but was not argued by Mr. Rangachari who stated that it stood or fell with the decision in the main case. The appeal must therefore be allowed with costs here and below and the memorandum of objections dismissed with costs.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

R. Srinivasa Reddy .. *Petitioner** (*Petitioner*).

v.

M. Dasaratharama Reddy .. *Respondent* (*Counter-Petitioner*).

Srinivasa Reddy v. Dasaratharama Reddy.

Criminal Procedure Code (*V of* 1898), *S* 145, *clause* (4), *Proviso* 1—*Construction—Preliminary order—Delay in passing of, not due to petitioner—Petitioner if loses benefit of section by reason of.*

A reasonable interpretation ought to be placed upon the first proviso to clause (4) of S. 145, Criminal Procedure Code, and not a literal interpretation which would defeat the very object of the clause.

Where, therefore, a person who is entitled to complain of forcible dispossession goes before a Magistrate and complains of such dispossession, if for no reason or no fault of his, the Magistrate does not pass a preliminary order at once but delays the passing of that order, though it may be *bona fide*, the person who complained to him of forcible dispossession should not be deprived of the benefit of S. 145 by reason of the delay caused in the Magistrate's Court.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Saidapet, dated 4th November, 1927 in Mis. Case No. 47 of 1927.

V. L. Ethiraj for petitioner.

The Public Prosecutor for the Crown.

Muhammad Asker Ali for respondent.

The Court made the following

ORDER.—The point raised in this case is that there was forcible dispossession, according to the petitioner on the 1st June, 1927, and according to the Sub-divisional Magistrate there was dispossession early in May, within two months of the presentation of this petition; but the Magistrate has found against the petitioner on the ground that the forcible dispossession was more than two months before the date of his preli-

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*Cr R. C. No 963 of 1927.
(Cr. R. P. No. 867 of 1927) 15th March, 1928.

Srinivasa Reddy v. Dasaratharama Reddy.

minary order. He has not definitely found whether there was or there was not forcible dispossession. The counter-petitioner's title to the property was under a sale-deed obtained by him on 31st May, 1927. He could not have had possession before that. If the Magistrate finds there was forcible dispossession, then he would have to see whether the 1st proviso to clause 4 of S. 145 is applicable to the case. The question he has to consider is this: When a person complains to the Magistrate is of forcible dispossession within a few days after the dispossession and asks him to take proceedings under section 145, if the Magistrate either by reason of his sending the petition to the police for enquiry or owing to pressure of work is not able to pass a preliminary order within two months, whether the opposite party should have the benefit of the delay caused in the Magistrate's Court. Though the words of the proviso are capable of the interpretation that the forcible dispossession must be within two months of the order yet the intent and the object of the section must be taken into consideration before a literal interpretation is put upon it. Where a person who is entitled to complain of forcible dispossession goes before a Magistrate and complains of forcible dispossession, if for no reason or any fault of his, the Magistrate does not pass a preliminary order at once but delays the passing of that order though it may be *bona fide,* the person who complained to him of forcible dispossession should not be deprived of the benefit of S. 145 by reason of the delay caused in the Magistrate's Court. I am supported in this view by my brother Wallace, J., who in Cr. R. C. No. 539 of 1926 observes :

> "I am not prepared at present to subscribe to the proposition that a party taking possession by force must be retained in possession if owing to delay after the dispossessed party has asked the Court to take action, on the part of the Court taking action over two months have elapsed before the Court finally makes up its mind to issue the preliminary order "

I think a reasonable interpretation ought to be placed upon the proviso and not a literal interpretation which would defeat the very object of section 145 (4) which relates to dispossession of immoveable property. I set aside the order of the Magistrate and direct him to restore the application to file and dispose of it in the light of the observations made above.

A.S.V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI.

Nemichand Sowcar .. *Petitioner**

v.

Kesarimull Sowcar and another .. *Respondents.*

Nemichand Sowcar *v.* Kesarimull Sowcar.

Arbitration—Award—Decree in terms of, under Indian Arbitration Act or under Civil Procedure Code—Award not signed by all arbitrators—Submission not filed as required by Original Side Rules—Effect—Portion of award cannot be made a rule of Court—Contract by one party to pay another a sum of money as per award in such a case—Remedy of latter.

On an application for a decree in terms of an award, the award was brought to Court by one of the arbitrators at the instance of the petitioner. The award was not signed by all the arbitrators.

Held, that the award could not be made a rule of Court either under the Indian Arbitration Act or under the Code of Civil Procedure.

The award could not be made a rule of Court under the Indian Arbitration Act because the submission was not filed as required by the Original Side Rules, and the award was not signed by all the arbitrators. It could not be made a rule of Court under the Code of Civil Procedure because the award was not by all the arbitrators, as required by S. 10 of Schedule II of the Code.

Neither under the Indian Arbitration Act nor under the Code can the Court make part of an award a rule of Court.

The remedy of a party to a reference who says that the award has been accepted by the other party to the reference and that the latter has entered into a special contract to pay him a sum of money is to file a suit on that contract and get a decree for the payment of the money. He cannot ask the Court to make that portion of the award a rule of Court.

V. Ramaswami Aiyar for petitioner.

V. C. Gopalaratnam for respondents.

The Court delivered the following

JUDGMENT.—This is an application for a decree in terms of an award which is said to have been given by certain arbitrators.

The award was brought to Court by one of the arbitrators at the instance of the petitioner. There is a dispute as to the validity of the award. The petitioner says that the award was by five arbitrators but we find that only one has signed it and he has presented it in Court. The respondents say that the reference was only to two arbitrators of whom only one has signed the award. In any view it seems to me that the award

**In re* award between, Nemichand Sowcar and Kesarimull Sowcar.
4th October, 1928.

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cannot be enforced as an award because it is not signed by five arbitrators as stated by the petitioner or by two as stated by the respondents.

Under the Indian Arbitration Act there has to be a written submission to arbitration and under the Original Side Rules it is the arbitrators that have to file the award in Court with the submission at the request of the parties.

Order 38, Rule 7 of the Original Side Rules says that an arbitrator or umpire desirous of filing an award in Court shall present to the Registrar a request to file the same, duly stamped, together with the submission to arbitration, and the award or a signed copy thereof. The said award or copies shall, unless otherwise ordered, be signed by the arbitrator or umpire.

Section 11 of the Indian Arbitration Act says that when the arbitrators or umpire have made their award they shall sign it.

Sub-clause (2) says that the arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award or a signed copy of it, to be filed in the Court; and notice of the filing shall be given to the parties by the arbitrators or umpire.

If the Indian Arbitration Act applies, it is clear that the award cannot be made a rule of Court because the submission is not filed as required by the rules. And it is admitted by the parties that the award has not been signed by all the arbitrators be it two or five.

Mr. Ramaswami Aiyar for the petitioner contends that the case does not fall under the Indian Arbitration Act because a suit cannot be filed with or without the leave of the Court upon the cause of action. It does not appear to me that this objection is valid because the parties reside in Madras, one of the properties is situate in Madras and with the leave of the Court, a suit for partition can be filed. So far as the properties situate outside British India are concerned, they will be the subject-matter of a separate suit in the state where they are situate, but the properties situate in British India can be divided with the leave of the Court as one item of immoveable property is situate in Madras and the parties reside in Madras.

Even assuming that the case does not fall under the Indian Arbitration Act but under Schedule II of the Civil Procedure

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Code, I must be satisfied that the award is an award which can be enforced. Section 20 of Schedule II of the Civil Procedure Code says that where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

Section 10 says that the award shall be signed by all the arbitrators.

Admittedly this award has not been so signed.

Mr. Ramaswami Aiyar's last contention is that the respondents have accepted the award and agreed to pay the petitioner a certain sum of money and that I can enforce that portion of the award. There is no provision either in the Civil Procedure Code or the Indian Arbitration Act empowering me to make part of an award a rule of Court. The award should be looked into as a whole and the rights of the parties worked out. If the award has been accepted and a special contract has been entered into by the counter-petitioners to pay the petitioner a sum of money, his remedy is to file a suit on that contract and get a decree for the payment of the money. I do not think his remedy is to come to Court and say that that portion of the award should be made a rule of Court and execution should issue as regards that portion alone.

I therefore dismiss the application with taxed costs.

A. S. V. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENTS—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

M. P. Sivapatha Mudaliar .. *Appellant** (*Plff.*)

v.

Sikandder Rowther .. *Respondent* (*Deft.*).

Sivapatha Mudaliar v. Sikandder Rowther.

Madras Local Boards Act of 1920, *S.* 104 (3) (*c*)—*Licensed in—Meaning of—Vehicle licensed under S.* 166 *not licensed within meaning of S* 104 (3) (*c*)—*Statute—Taxing statute—Strict construction in favour of subject—Rule as to—Inapplicability of, when there is no doubt as to meaning.*

The word "licensed" in section 104 (3) (*c*) of the Madras Local Boards Act of 1920 means licensed under clause (2) of the same section and not licensed for any purpose whatever. A motor vehicle licensed under

*S. A. No. 7 of 1928. 26th April, 1928.

Sivapatha Mudaliar v. Sikander Rowther.

section 166 of the Act to ply for hire or take passengers or goods at certain rates is not one licensed within the meaning of S. 104 of the Act.

The rule that "Taxing Acts" should be construed in the strictest sense in favour of the subject is not applicable to a case in which there can be no reasonable doubt as to the meaning of the statute.

K. Rajah Aiyar and *R. Sundaralingam* for appellant.

P. Venkataramana Rao and *P. K. Janakiram* for respondent.

The judgment of the Court was delivered by

Phillips, J.

Phillips, J.—The only question for decision here is whether the word "licensed" in section 104 (3) (*c*) of the Madras Local Boards Act of 1920 means licensed under clause (2) of the same section or in the wider sense of licensed for any purpose whatever. The appellant contends that if a license is granted under section 166 to use a motor vehicle to ply for hire or to take passengers or goods at certain rates then such a vehicle is one licensed within the meaning of section 104 and is not liable to pay toll. To put this general construction upon the word "licensed" when it follows immediately after the clause dealing with certain particular licenses would be straining the words of the section and consequently the interpretation put upon it by the District Judge seems to be a correct one. The various arguments put forward here have all been dealt with in his judgment and there is really nothing to be added thereto. The question of construing "Taxing Acts" in the strictest sense in favour of the subject can hardly apply here for there cannot really be reasonable doubt as to the meaning of the word "licensed" in clause (*c*). Judicial opinion as to whether statutes imposing tolls need not be construed so strictly appears to be somewhat divided in England, but it is unnecessary to consider that point here for there is really no doubt in this matter.

The appeal is accordingly dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

K. V. Desikachariar and others .. *Appellants** (*Plffs.*)

v.

The Secretary of State for India in Council through the Collector of Tinnevelly and another .. *Respondents* (*Defts.*).

Desikachariar v. Secretary of State for India.

Village natham—*Inhabitants of village—Proprietary right of, in such* natham—*Proof necessary to establish—Use of site for village cattle to*

*Second Appeal No. 1084 of 1925. 27th September, 1928

Desika-chariar v. Secretary of State for India.

gather and for village people to assemble during festivals in adjoining temple —Not sufficient—Dharkast rules—Grant by Revenue authorities under—Validity of—Jurisdiction of Civil Courts to question.

Plaintiffs sued as representatives of the inhabitants of a village for a declaration that the suit land, which was registered as *natham* in the settlement register, belonged to them and also for possession of the same from the defendants after cancellation of a grant made by the Government, the 1st defendant, under Dharkast rules to the 2nd defendant. The plaintiffs proved that the suit site was used for the village cattle to gather in the early morning for over sixty years and also that people used to assemble on the site during festivals in the adjoining temple.

Held, that the user proved would not deprive the Revenue authorities of their right to deal with property under Dharkast rules, that to establish the plaintiffs' right to the property there must be evidence that the same was dedicated or set apart as a cattle-stand or for any purpose connected with the temple, and that the plaintiffs, who had no right to the property, were not entitled to call in question the action of the Government in making the grant to the 2nd defendant.

The action of Revenue authorities falling within their jurisdiction cannot be questioned in Civil Courts.

Second appeal against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in A.S. No. 218 of 1924 (A.S. No. 354 of 1924, District Court, Tinnevelly) preferred against the decree of the Court of the Principal District Munsif of Tinnevelly in O.S. No. 335 of 1921.

S. Rajagopalachariar for appellants.

The Government Pleader and *K. V. Sesha Aiyangar* for respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants. They filed a suit as representing the inhabitants of a village for a declaration that five cents of land mentioned in the plaint belongs to them and also for possession of the same from the defendants after cancellation of a grant made by the 1st defendant (the Government) under Dharkast rules to the 2nd defendant. The plaintiffs contended that the property belonged to the village and so the Government had no right to grant it to the second defendant.

The important question raised in the case was whether the suit land was communal land as alleged in the plaint. Admittedly it is registered as *natham* in the Settlement Register. The plaintiffs were able to prove that the site was used for the village cattle to gather in the early morning for over sixty years and also that people used to assemble on the site during festivals

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in the adjoining temple. It has been held by this Court, see *Collector of Godavari District* v. *Pedda Rengayya*[1] and *The Taluk Board, Dindigul* v. *Venkataramier*,[2] that such user is not intended to deprive the Revenue authorities of their right to deal with property under Dharkast rule. In order to establish the plaintiff's right to the property there must be something more than these acts of user. There must be evidence that the land in question was dedicated or set apart as a cattle-stand or for any purpose connected with the temple. Both the Lower Courts have found that there is no evidence of dedication in this case. Concurring with the opinion of the Lower Courts I must, therefore, hold that the plaintiffs have not made out that the inhabitants of the village are entitled to the suit property with absolute proprietary rights, nor is there any evidence to show that they have established a right of easement over it.

Since the plaintiffs have no right to the property I do not think they are entitled to call in question the action of the Government in making the grant to the 2nd defendant. It is argued that even if the plaintiffs have no right they are entitled to challenge the validity of the grant. It has been held in this Court that the action of Revenue authorities falling within their jurisdiction cannot be questioned in Civil Courts, see *Mathuveera Vandayan* v. *The Secretary of State for India.*[3] The decision in *The Secretary of State for India in Council* v. *Kasturi Reddi*[4] cited by the learned Advocate for the appellant does not support him. What was decided there was that "when a person claims that a grant has been made to him by an officer on behalf of the Crown, the mere fact that the alleged grant purports to have been made under the Dharkast rules does not affect the jurisdiction of Civil Courts to determine whether a grant has been made which would bind the Crown or any one claiming under it subsequent to such grant." In view of the finding that the plaintiffs have not established their right to the property that principle cannot be applied in this case. In these circumstances I dismiss the second appeal with costs.

A. S. V. *Appeal dismissed.*

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1. (1903) 4 M.L.T. 440. 2. (1923) I.L.R. 46 Mad 866: 45 M.L.J. 333.
3 (1906) I.L.R. 30. Mad. 270. 4. (1902) I.L.R. 26 Mad. 268: 12 M.L.J. 453,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

T. Raju .. *Appellant** (*Plff.*)

v.

Nagammal and another .. *Respondents* (*Defts.* 1 & 2).

Raju v. Nagammal.

Hindu Law—Adoption by widow—Agreement between natural father and widow restricting rights of adopted son—Validity—Effect of decision of Privy Council in Krishnamurthi *v.* Krishnamurthi*—Absolute interest to widow in portion of property—Agreement giving—Validity.*

With regard to agreements brought about at the time of adoption by the natural father acting on behalf of the adopted son, the effect of the decision in *Krishnamurthi* v. *Krishnamurthi* [(1927) L.R. 54 I.A. 248: I.L.R. 50 Mad. 508: 53 M.L.J. 57 (P.C.)] is this:—(1) If the agreement provides a gift to strangers it is void; (2) if the arrangement confers advantages on the widow, it will continue to be valid if it is fair and beneficial as before and invalid if unfair. An arrangement giving an absolute interest to the widow in some items of the property which do not amount to practically the whole of the property, and which still leave a substantial part of the property for the adopted son may still be regarded as fair and beneficial and therefore may be valid.

Per *Venkatasubba Rao, J.*—In the matter of arrangements in favour of widows, the law has not been in the least disturbed. For determining their validity, the tests that were laid down in *Visalakshi Ammal* v. *Sivaramien* [(1904) I.L.R. 27 Mad. 577: 14 M.L.J. 310 (F.B.)] must still be applied.

Appeal against the decree of the Subordinate Judge of Mayavaram in O.S. No. 25 of 1923.

S. Varadachariar, T. V. Muthukrishna Aiyar, N. Muthuswami Aiyar and *S. V. Venugopalachariar* for appellant.

T. R. Ramachandra Aiyar, K. S. Venkataramani, S. Panchapakesa Aiyar and *T. V. Ramanatha Aiyar* for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS.: *Ramesam, J.*—The facts of this case may be briefly stated as follows: One Kothandarama Aiyar of Poongavoor (Tanjore District) died on 25th April, 1905, leaving two daughters (1) Nagammal, 1st defendant, who is a widow, and (2) Gnanambal, his adoptive mother Valambal, and his widow Parvathi Ammal. Prior to his death he had executed a will, dated 20th September, 1902, Ex. XIII, (2) a will, dated 8th September, 1903, of which we have no record, (3) a will, dated 29th October, 1903, cancelling the previous will, (Ex. VI), and

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*Appeal No. 32 of 1924. 6th August, 1928.

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(4) a last will, dated 13th March, 1905 (Ex. A) in which all previous wills were cancelled. Along with the will of September, 1903, he executed a deed of settlement, dated 3rd September, 1903; but it was never registered and therefore never came into operation. Under his last will, Ex. A, he gave power to his widow to adopt either a son of his daughter Gnanambal provided she begets a son before January 1908, or a son of any one of his nephews, T. Subramania Aiyar or T. Venkatarama Aiyar. He made certain dispositions to come into effect in the event of either contingency. At the time of his death Gnanambal had no son. The widow Parvathi Ammal resolved upon adoption immediately after his death. Necessarily she had therefore to adopt a son of one of the testator's nephews named in the will. She resolved to adopt the son of Subramania Aiyar and an agreement was executed settling the terms on which adoption was to be effected. This is Ex. I, dated 26th April, 1905. The boy was adopted on the same date but the deed of adoption evidencing it (Ex. II) was executed on 2nd May. The present suit is filed by the adopted son T. Raju praying for a declaration of his title to the suit lands, namely, the lands of the village of Nallathakudi which formed part of the property of the deceased Kothandarama Aiyar. Parvathi Ammal died on 2nd July, 1918 and Valambal died on 10th June, 1917. The present suit was filed on 30th August, 1919. The Subordinate Judge who tried the suit dismissed it on the ground that the adopted son was not entitled to the suit properties relying on the terms of Ex. I. The plaintiff appeals.

Two points have been argued before us in appeal: (1) What are the terms of the deed of settlement, dated 3rd September, 1903 bearing on the suit lands, and (2) How far does Ex. I bind the plaintiff. The first question becomes necessary to decide because the terms of the deed of settlement were incorporated into Ex. I by reference to it, and though the deed of settlement itself was not registered, we have yet to ascertain its contents. The document itself is not forthcoming having been filed for refund of stamp duty and never taken back. D.W. 1 is the other nephew of the testator, namely, Venkatarama Aiyar and he gives evidence that one of the terms of the settlement was that a half of the suit lands should be enjoyed by Valambal for life and that Parvathi Ammal, the widow, should have absolute interest in the remainder of that half and in the other half. He proceeds to add further terms cutting down the absolute estate of Parvathi Ammal in the event of her dying

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without alienating the property. It is extremely doubtful if the latter portion of the evidence can be accepted. Though at the time of the adoption, he co-operated in bringing about the adoption, for we find him to be an attestor of Ex. I, he has now taken an attitude adverse to the plaintiff. The reason for this is obvious. At the time of the adoption one of the matters contemplated by all the parties was that Alamelu, daughter of the 1st defendant Nagammal, should be given in marriage to Krishnamurthi, son of this witness, and that Alamelu should get an absolute right in the lands of Kothankudi. Thus it was contemplated that Kothankudi lands should go by means of this marriage to the family of Venkatarama Aiyar just as the family of his brother Subramania gets a portion of the testator's property by means of the adoption. But unfortunately this marriage never took place and Venkatarama Aiyar's family did not benefit. Though, therefore, it is not safe to rely upon the evidence of this witness, still, as I will presently show, the first portion of his evidence appears to be true. D.W. 2 never saw the settlement deed as his cross-examination shows and his evidence about its contents is useless. D.W. 3 is the 1st defendant. She never read the settlement deed but heard when the terms were dictated by her father. Assuming this is good evidence, it is doubtful if we can rely upon such evidence for ascertaining the terms of the settlement. I am not willing to rest my conclusion as to the terms of the settlement on the evidence of D W. 1 and D.W. 3 only as the Subordinate Judge does. We have got Ex. VI which refers to the terms of the settlement deed and which in my opinion seems to be conclusive as to what they were. Reading Ex. VI, it is clear that the scheme of the testator in September and October, 1903, was first, to make provisions in favour of his daughters, mother and wife by means of a deed of settlement, leaving certain properties, and these he intended to deal with by a will in favour of the adopted son. Accordingly he executed a deed of settlement, dated 3rd September, and will of 8th September. He cancelled the will and executed another will on 29th October, namely, Ex. VI. In para. 2 of Ex. VI he says that under the deed of settlement, dated 3rd September, he made suitable provisions for his daughters, mother and wife. In para. 3 he gives authority to his wife to make the adoption. In para. 4 he says that the adopted son should have an absolute interest in

"the properties which remain after excluding those which I have distributed under the deed of settlement referred to above, that is, the nanja, punja, etc.,

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lands, buildings, houses, sites, trees, etc., which belong to me in Kokkur village, together with the shares in all the *samudayams* belonging to me."

This clause shows that the properties now dealt with by the deed of settlement comprised only the lands in the Kokkur village. Mr. Varadachariar, the learned vakil for the appellant, who argued the case with his usual fairness and ability, contended that this clause (4) does not necessarily show that the whole of the interest in the suit lands had been disposed of by the settlement. He contends that the clause is consistent with making a gift of an interest for life in the suit lands to Parvathi Ammal and the remainder remaining outstanding to the adopted son, and the reference to the lands in Kokkur village only was made because the life-interest in the suit lands had been disposed of. We cannot agree with this contention. If only the life-interest had been given to Parvathi Ammal in the suit lands, there is a vested remainder undisposed of and such undisposed of interest must have been necessarily referred to along with the lands in the Kokkur village. The parties belong to a very intelligent class of people, namely, Tanjore Brahmins, who are almost as well versed in legal ideas about remainders as trained lawyers, and anyhow they are assisted by a High Court Vakil, Mr. T. Natesa Aiyar, who was an attestor of Ex. I. He is a brother of Subramania Aiyar and Venkatarama Aiyar already referred to. In Ex. I the sentence

"The adopted son Raju himself is, as mentioned in the deed of settlement, to get all the properties in Kokkur village and enjoy the same with absolute rights"

shows that the adopted son had no vested remainder in the suit lands. This can be only because the suit lands were completely disposed of by the settlement in favour of the wife. Whether we look at the terms of Ex. I or Ex. VI it seems to be clear that the suit lands were given away to Parvathi Ammal absolutely after life-interest in half of the lands of her mother-in-law. Valambal. It is because of the light thrown by these two documents that I am inclined to believe the first half of the evidence of D.W. 1 and not the later portion when he speaks of further dispositions in case Parvathi Ammal died without alienating. The motive for this further addition is clear. He wants to ensure that the property will not reach the adopted son in any event. In the ordinary course, after Parvathi Ammal's death (intestate) the daughters succeed to a Hindu daughter's interest in the suit lands and, as this is not an absolute interest, there is a further chance of the adopted son getting these properties if the daughters die without male issue or daughter's

sons. The witness's object was to cut off this chance also. But, as a matter of fact, Parvathi Ammal left a will which was in dispute at the time when the witness deposed, but we are informed it has since been found to be genuine. The contingency contemplated by the witness did not in fact arise. I am not prepared to believe that portion of the evidence, but there is no reason why we should not believe the evidence in so far as it shows that Parvathi Ammal got absolute interest in the suit lands.

The second question that arises is how far is Ex. I binding on the plaintiff. As we have seen, the terms of the settlement are incorporated in Ex. I. It is conceded on all hands that, but for Ex. I, the plaintiff is entitled to the suit properties on the construction of Ex. A.

The only question that now remains is whether Ex. I is binding upon the plaintiff. The Subordinate Judge held that it was binding on the plaintiff with reference to the then case-law on the subject. At the time when the Subordinate Judge decided the case he had not the benefit of the latest decision of the Privy Council in *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar*[1] and we have now to decide the case in the light thrown on the question by this decision of the Privy Council. That decision modified the judgment of the Madras High Court reported in *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar*.[2] Up to the decision of the Privy Council, according to the law as understood in India and specially as laid down by decisions of the Madras and Bombay High Courts, an agreement brought about at the time of adoption by the natural father acting on behalf of the adopted son may be binding on him, if it is fair and beneficial to him, though it cuts down part of the interest which he would get but for such agreement, and would not be binding on him if it is not fair and beneficial. The decision of the Judicial Committee has now modified this view. Viscount Dunedin who delivered the judgment of the Board referred at length to the Bombay and Madras cases. The noble Lord summed up the Bombay cases thus:

> "As a question of actual decision, the Courts have always upheld the grant to the widow of her interest for life. . . . But when the gift is to outsiders it has been held invalid. . . . The reasons given have varied."

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1. (1927) L.R. 54 I.A. 248: I.L.R. 50 M. 508: 53 M.L.J. 57 (P.C.).
2. (1924) 49 M.L.J. 252.

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Then the noble Lord summed up the Madras cases thus:

"As regards decisions, the general result has been to validate the arrangements so far as provision is made for the widow just as in Bombay . . . As regards reasons, again they vary . . . ."

Then the Board's conclusion is stated thus:

"They are of opinion that there is such a consensus of decision in the cases . . . that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father . . . . the mere postponement of his interest to the widow's interest, even though it should be one extending to a life-interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements.

As soon, however, as the arrangements go beyond that, *i.e.*, either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu Law."

I think, as I understand their Lordships' judgment, the effect of it seems to be this: (1) If an agreement provides a gift to strangers it is void, (2) If the arrangement confers advantages on the widow, it will continue to be valid if it is fair and beneficial as before and invalid if unfair. As illustrative of the last proposition, even if the agreement confers life-interest on the widow in the whole property and the adopted son's enjoyment begins after the death of the widow, it will still be regarded as fair and valid. If the whole property is given absolutely to the widow, it will be regarded as unfair.

I infer from the above summary that if absolute interest is given to the widow in some items of the property which do not amount to practically the whole of the property, or in other words if a substantial part of the property is still left for the adopted son, the arrangement may still be regarded as fair and beneficial and therefore may be valid. I do not understand the last sentence which I quoted from the Privy Council judgment to lay down that if a very small item of property is given absolutely to the widow and if the adopted son gets very large property, still the whole disposition will be invalid. Such a view seems to be against the reasons given by their Lordships and would be anomalous, comparing it with the other illustrations referring to the gift of life-interest in the whole property to widow. The word 'property' in the last sentence, I think, refers to the whole of the property. In construing that sentence, one must remember that the actual case before their Lordships related to a gift to strangers and this they held to be invalid. They

were not considering in detail particular cases of gifts to the widow. Only one case was given as illustration. On this part of the case I have had the advantage of reading my brother's judgment and I entirely agree with his view of the decision of the Privy Council and also his view on the question whether the agreement Ex. I can be regarded as fair and beneficial to the adopted son which is also that of the Trial Judge.

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The result is that the appeal fails and is dismissed with costs.

The defendants have not given up the point they raised in the first Court, *i.e.*, that there was an oral disposition of the suit lands by the testator after Ex. A. But we found it unnecessary to hear them on this point.

Venkatasubba Rao, J.

Venkatasubba Rao, J.—This is an appeal from a judgment dismissing the plaintiff's suit. He seeks to recover, as the adopted son of one Kothandarama Aiyar, a village known as Nelathikudi from the latter's daughters, the 1st and 2nd defendants. Kothandarama Aiyar died on the 25th of April, 1905 having executed a will (Ex. A), dated the 13th of March, 1905. It is unnecessary to state in any detail the terms of that will, beyond mentioning that the testator conferred by it upon his wife Parvathi, an authority to adopt. On the very day after the testator died, his widow adopted the present plaintiff as her son. Before the adoption was made, an arrangement was come to (Ex. I, dated the 26th of April, 1905) regarding the enjoyment of certain properties and to that arrangement the natural father of the boy was an assenting party. Two questions are raised in the suit, first, a question of fact relating to the terms of this ante-adoption arrangement; secondly, a question of law regarding its validity.

The plaintiff bases his title on the will which bequeaths to him the village in question after the deaths of the testator's mother and widow, who were to enjoy it for their lives. The former died in 1917, the latter in 1918 and the suit was filed in 1919.

The suit is resisted on the ground that under the ante-adoption arrangement, Nelathikudi was given absolutely to the adoptive mother, who, before her death, made a will disposing of it in favour of her daughters, the defendants. As I have said, the first point to decide is a question of fact. Is it a part of the arrangement that Nelathikudi was to be taken absolutely by the testator's widow? The learned Trial Judge, upholding the contention of the defence, has found that under the arrange-

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ment Nelathikudi was given absolutely to her. My learned brother has dealt with that point fully and, for the reasons given by him, I agree in the conclusion arrived at by the Lower Court.

This leads me to the consideration of the next question. Is the agreement valid? The Lower Court, applying the test laid down in the cases decided by this Court, has come to the conclusion that the agreement was fair and reasonable, that it was for the benefit of the adopted son and is therefore binding upon him. The argument for the appellant is, that the law on this point has since been declared by the Judicial Committee to be entirely different in *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar*.[1] The point raised is thus of far-reaching importance and it is our duty to very carefully consider the scope and effect of the Privy Council decision. It is undoubtedly true that the case itself decides a narrow point, but the judgment contains a valuable exposition of the principles relating to ante-adoption agreements—an exposition to which the greatest weight must be attached.

The argument for the appellant may be shortly put thus: If the effect of the arrangement is to allow the adoptive widow to retain a life-interest in the property, even though it may extend to the whole property, that arrangement is valid; but if a portion of the property, however small that portion may be, is allotted absolutely to the widow, that offends against the principle laid down by the Judicial Committee. To take a concrete case, if the property is worth a crore and the widow who, let us assume, is in her teens, makes the adoption, there is nothing in law to prevent her from having for her whole life at her absolute disposal the entire income from this large property, which may amount to lakhs; but if a small fraction of this extent, say, a property worth Rs. 10,000 is allotted to her absolutely that arrangement is bad, and cannot be upheld. This is, in short, said to be the effect of the dicta contained in the judgment. I am decidedly of the opinion that this contention is wrong.

To understand the decision correctly, we must first look at the facts of that case. The question there raised was, whether the provisions of a will made by the adoptive father were valid by reason of an ante-adoption arrangement. By that will, certain lands were devised to persons "who were connections but

1. (1927) L.R. 54 I.A. 248: I.L.R. 50 M. 508: 53 M.L.J. 57 (P.C.).

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were in no case within the degrees entitled to maintenance," that is to say, some distant relations of the adoptive father. The suit was filed after the death of the testator by the legatees against the adopted son for the recovery of those lands. The case thus raised a question regarding persons "not within the degrees entitled to maintenance," and this distinction is of fundamental importance and is emphasised throughout the judgment. The opening paragraph refers to this important factor and several subsequent passages lay stress upon it. In summing up the Bombay cases, their Lordships draw a clear distinction between what the Courts did in regard to gifts to the widow of her interest for life and gifts made to outsiders. They point out that "the Courts have always upheld the grant to the widow of her interest for life," whereas "when the gift is to the outsiders it has been held invalid." Then again, when the effect of the Madras decisions is stated, similar language is used. Their Lordships say:

> "As regards decisions, the general result has been to validate the arrangement so far as provisions are made for the widow just as in Bombay."

To quote a further passage, the same idea underlies the following remarks:

> "They are of opinion that there is such a consensus of decision in the cases with the exception of the case of *Jagannadha* v. *Papamma*,[3] that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son."

This I consider to be the most essential part of the judgment. The antithesis is, between the right of the widow on the one hand, and on the other the right of the "outsiders" or "strangers" or persons "in no case within the degrees entitled to maintenance." It must be borne in mind that the actual decision itself, as I have already said, was in respect of outsiders, that is, those not entitled to maintenance.

In regard to gifts to widows, the matter stood thus. They were upheld by the Indian Courts but the reasons on which they were so upheld were various. Their Lordships examine the soundness of these reasons and reject them as being totally opposed to principle. But—and this is significant—the result of the decisions was accepted, however, not on the ground that they were based on sound reasoning, but, as it might be inferred from their all but uniform course, that by Hindu custom and usage the law was modified to the extent of sanctioning arrange-

3. (1892) I.L.R. 16 Mad. 400: 3 M.L.J. 193.

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ments "in so far as they regulate the right of widow as against the adopted son." The arguments of Subramania Aiyar, J., in his referring order in *Visalakshi* v. *Sivaramien*[4] were clearly opposed to the opinion of the Full Bench expressed later in the same case. The Judicial Committee approves of the reasons mentioned by that learned Judge, but are not prepared to adopt at the present day his conclusion. There is no warrant for saying that the decision of the Full Bench, which was at that time regarded as of binding authority in Madras, was overruled by the Privy Council. Indeed, on the contrary, it is patent from their judgment, that this was the course which their Lordships were not prepared to, and did not, adopt. In this connection, I may observe that in the Full Bench case, though other reasons are given, reasons which must now be taken to be unsound, the ground of custom is specifically mentioned. Benson, J., with whom the other Judges concurred, quotes from West and Buhler:

> "Fair arrangements for the protection of the widow's interest, during her life, are commonly made, and are always supported by the authority of the caste,"

a view which found favour with the Full Bench. What then is the effect of the Privy Council decision? It unequivocally holds that such arrangements cannot be upheld as give property to strangers; in other words, *Ganapathi* v. *Savitri*[5] is inferentially overruled; where it had been held that a disposition in charity by the adoptive father was binding; on the other hand, *Balkrishna Motiram* v. *Sri Uttar Narayan Dev*[6] is inferentially upheld, where a gift by the adopting father in favour of a charity was by the High Court held bad. It may not be out of place to enquire why the Bombay High Court held that gift bad. The reason is contained in a passage in the judgment of Hayward, J., which has been cited by the Privy Council. And what is that reason? "Agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu Law." But, there is no reason to recognise the custom in support of a more general extension of the modification. This is precisely the view that the Judicial Committee itself has now taken. The point on which I wish to lay stress I may again refer to in this connection. In the judgment of Hayward, J., the words used are "agreements for reasonable provision for widows" without a distinction being made between an absolute gift and a life-estate.

4. (1904) I.L.R. 27 M 577: 14 M.L.J. 310 (F.B)

5. (1897) I.L.R. 21 M. 10.

6. (1918) I.L.R. 43 B. 542.

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I am clearly of the opinion therefore that in the matter of arrangements in favour of widows the law has not been in the least disturbed. For determining their validity the tests that were laid down in *Visalakshi* v. *Sivaramien*[4] must still be applied. Did the arrangement receive the consent of the natural father and was it a fair and reasonable one and for the minor's benefit? If these tests are satisfied, the Courts will uphold the arrangement, if not, they will not.

Mr. Varadachari for the appellant seeks support for his argument in the passage in the judgment of the Judicial Committee which reads thus:

"As soon, however, as the arrangements go beyond that, that is, either *give the widow property absolutely* or give the property to strangers, they think no custom as to this has been proved to exist, and that such arrangements are against the radical view of the Hindu Law."

If this sentence stood alone, it would doubtless support the contention that their Lordships were intending, a contrast between a gift of a life estate and an absolute gift, to a widow. But, can we disregard the tenor and tendency of the whole judgment taken together by laying undue stress on a stray word or an isolated phrase? The dangers that follow from such a course are quite apparent. For instance, take the following passage from the same judgment:

"But the concensus of judgments seems to solve these two questions in this way—namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life-interest in the whole property, is not incompatible with his position as a son. Their Lordships are therefore prepared to hold that custom sanctions such arrangements."

Can it, on the strength of this passage, be contended that however unfair or unreasonable, an arrangement must in every case be upheld on the ground that what is given to the widow is a mere life-interest although it extends to the whole property? I think not. And again, on the strength of the same passage, can it be contended that the consent of the natural father has always the effect of validating an arrangement irrespective of its being fair or not fair? These considerations show that what we must have regard to is the judgment taken as a whole, and understood reasonably, and not merely a passage here or there taken out of its context.

The learned Subordinate Judge has come, on the evidence, to the conclusion that the arrangement assented to by the plain-

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4. (1904) I.L.R. 27 M. 577: 14 M.L.J. 310 (F.B.).

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tiff's natural father was fair and *bona fide* and for the minor's benefit. I entirely agree in that view and shall shortly state my reasons. The Sub-Judge points out that if the plaintiff had remained in his natural family he would have been entitled, as it was then constituted, to properties worth about Rs. 20,000, whereas, in virtue of the adoption he obtained an estate worth at least five times that value, that is, about a lakh. There is another fact to which I may call notice. Kothandarama Aiyar's intentions in regard to the village in question varied from time to time. He made a will (Ex. 13) in 1902 devising the village absolutely to his wife in the case of her adopting one of his nephews —the event which has actually happened. In September, 1903, he made a settlement deed whereby again the village was given absolutely to his wife. In October, 1903, he made a second will (Ex. 6) by which he confirmed the provision made in the settlement deed. Only by Ex. A, his last will, he made a disposition somewhat different in this respect, that is to say, he conferred only a life-estate upon his widow. Thus we find that in the view of the testator a gift of this village to his wife, in the event that has happened, was not an unreasonable provision. He declared his intentions as I have shown on four occasions, and on three out of them what he intended his wife to take was an absolute and not a mere life-estate. Judged from any point of view, the arrangement seems to be a fair and reasonable one as the Sub-Judge has found and it must therefore be upheld.

I therefore agree that the appeal fails and it is dismissed with costs.

A.S.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Yellamaraju Venkatasubba Rao .. *Appellant* (1st Deft.)*

v.

Goteti Vigneswaradu (dead) and others .. *Respondents (Plaintiff and Defendants 2 to 14 and L.R. of the 13th deceased defendant and L.Rs. of the deceased 1st respondent—Plaintiff).*

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Civil Procedure Code (V of 1908), O. 21, Rr 58 and 63—Unsuccessful claimant—Suit to establish right to property—Claimant out of possession

*Appeal No. 263 of 1923. 16th January, 1928.

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on date of suit—If bound to include prayer for possession—Subsequent suit to recover possession—If barred—Civil Procedure Code, O. II, R. 2—Decision in the previous suit—When res judicata in the subsequent suit—Civil Procedure Code, S. 11—Case falling under—Court if can travel outside section.

A claimant under O. 21, R. 58 of the Civil Procedure Code who has been unsuccessful can institute a suit to establish the right which he claims to the property without praying for recovery of possession of the property, even though he was out of possession on the date of suit, the property having been delivered to the auction purchaser in execution of the decree; and a subsequent suit by him for recovery of possession of the property after the decree in the previous suit in his favour is not barred by O. II, R. 2 of the Civil Procedure Code.

Kristnam Sooraya v. *Pathma Bee,* (1905) I.L.R. 29 Mad. 151 (F.B.). *Basivi Reddi* v. *Ramayya,* (1916) I.L.R. 40 Mad 733: 31 M.L.J. 394 explained and distinguished.

The decision by the Court in a suit under O. 21, R. 63 of the Civil Procedure Code by the defeated claimant to establish his right to the property in dispute is not *res judicata* in a subsequent suit by him for recovery of possession of the property, if the Court which tried the prior suit would have no pecuniary jurisdiction to try the subsequent suit.

Misir Raghobardial v. *Sheo Baksh Singh,* (1882) I.L.R. 9 Cal. 439 (P.C.) and *Run Bahadur Singh* v. *Lucho Koer,* (1884) I.L.R. 11 Cal. 301 (P.C.) referred to.

Where a case in terms falls within section 11 of the Civil Procedure Code, the Court cannot travel outside the section for the purpose of determining whether the matter is *res judicata* or not.

Hook v. *Administrator-General of Bengal,* (1921) I.L.R. 48 Cal. 499: 40 M.L.J. 423 (P.C.) distinguished.

Gokul Mandar v. *Pudmanand Singh,* (1902) I.L.R. 29 Cal 707: 29 I.A. 196 (P.C.) referred to.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla in O.S. No. 103 of 1921.

V. Ramadoss, A. Krishnaswami Aiyar, P. Satyanarayana Rao and *V. Govindarajachari* for appellant.

S. Varadachariar and *V. Suryanarayana* for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS. *Kumaraswami Sastri, J.*—This appeal arises out of a suit filed by the plaintiff to recover possession of the lands claimed in the plaint and mesne profits. The case for the plaintiff is that he purchased the lands on the 20th of July, 1913 for Rs. 40,000, that, out of this sum, Rs. 12,000 was paid to discharge a debt due by his vendor and the balance of Rs. 28,000 was applied towards setting aside a sale held in execution of the decree in O.S. No. 500 of 1912 against the 1st defendant, that the amount was deposited in Court on the 21st of July, 1913 and the sale was set aside under the orders of the Court on the

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19th of August, 1913, that, after the setting aside of the sale, the 1st defendant who had obtained another decree against the plaintiff's vendor attached the property in execution of his decree in O.S. No. 1075 of 1912, that a claim was preferred by the plaintiff which was dismissed on the 12th of January, 1914 and that on the dismissal of the claim the 1st defendant purchased the properties in the plaint on the 12th of January, 1914 in furtherance of the attachment of the 21st of August, 1913 and took possession of the same through Court in June, 1914 and has been in possession and enjoyment ever since. The plaintiff, on his claim being dismissed, filed O.S. No. 1243 of 1914 to establish his right to the properties in dispute and the suit was finally decreed in his favour on the 1st of November, 1920. He, therefore, claims possession of the properties on the ground that his right having been established the attachment and sale under which the 1st defendant claims are invalid and the 1st defendant has no title to the properties.

Defendants 2 to 4 are impleaded as being lessees in actual possession of the lands.

The 1st defendant filed a written statement raising various defences, but it is only necessary to consider some of them in this appeal. The first ground is that the plaintiff ought in his former suit (O.S. No. 1243 of 1914) to have claimed possession of the properties and not to have confined himself to a bare declaration as on the date of that suit he was out of possession and that the present claim for possession is barred under O. 2, R. 2, Civil Procedure Code. The next contention is that the sale to the plaintiff was without consideration and was intended to defeat and delay the creditors and therefore passed no title to the plaintiff. The third contention is that the proceedings in O.S. No. 1243 of 1914 did not preclude the defendant from raising the objection as to the validity of the sale, as that decision was by the District Munsif's Court which had no pecuniary jurisdiction to try the question raised in the present suit, section 11, Civil Procedure Code, therefore not applying to the case.

As regards the applicability of O. 2, R. 2, Civil Procedure Code, I am of opinion that it has no application to the facts of the present case. When the claim petition was filed and when the order dismissing the claim was passed, the 1st defendant had not become the purchaser nor was he in possession of the properties. The plaintiff was in possession.

Order 21, Rule 58 refers to claims to attached property. Rule 60 refers to cases where the claim is allowed and provides

for the release of the property from attachment on the allowing of the claims. Rule 61 provides for the dismissal of the claim where the Court is satisfied that the property when attached was in the possession of the judgment-debtor as his own property. Rule 63 which provides for a suit by an unsuccessful party runs as follows:—

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Art. 11 of the First Schedule of the Limitation Act which provides for the period of limitation for such suits runs as follows:—

"By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order:—(1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to, the attachment of property attached in execution of a decree, one year from the date of the order."

It will thus be seen that the suit contemplated under R. 63 is a suit to establish the right which he claims in the claim petition and the cause of action in the suit filed under Rule 63 must be the cause of action comprised in the claim petition.

Turning to the facts of this case it is admitted that the 1st defendant took possession of the properties as purchaser in Court sale held long after the dismissal of the claim and the accrual of the cause of action to the plaintiff under Rule 63. Order 2, Rule 2 enacts that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; and that where a plaintiff omits to sue in respect of, or intentionally relinquished any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

In applying this rule one has to keep in mind the difference between cases where a plaintiff joins in one suit several causes of action which can be joined under the provisions of the Civil Procedure Code and cases where a plaintiff is entitled to ask for more than one relief in respect of the same cause of action. In the former case the plaintiff has the option of instituting one suit to cover all the causes of action at the date of the plaint and in the latter case he is bound to join all the reliefs which he claims in respect of a single cause of action on pain of his right to file another suit in respect of any relief not so joined being lost. I need only refer to the observations of

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Lord Moulton in *Saminathan Chetti* v. *Palaniappa Chetti*.[1] His Lordship referring to section 34 of the Ceylon Civil Procedure Act which is the same as Order 2, Rule 2, Civil Procedure Code, observes:

"Their Lordships are of opinion that the learned Judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action different causes of action, even though they arise from the same transactions."

In *Ponnammal* v. *Ramamirda Aiyar*[2] it has been held by a Full Bench of this Court that a claim for possession and a claim for mesne profits are separate causes of action though they arise out of one act of dispossession.

The nature of a suit filed by an unsuccessful claimant under the provisions of the Civil Procedure Code has been considered by their Lordships of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra*.[3] That was a case where a person purchased certain property from a judgment-debtor and was in possession. In execution of a decree against judgment-debtor the property was attached. A claim filed by the purchaser was rejected and a suit was brought for a declaration of his right to the property. The question was what was the Court-fee payable. If it was merely a suit to set aside a summary order rejecting a claim, Rs. 10 would be payable, but if it was treated as a suit to recover possession of property the *ad valorem* fee would be payable on the value of the property. The Subordinate Judge and the High Court on appeal required the *ad valorem* fee to be payable. Their Lordships of the Privy Council reversed the decision and held that the case fell under Art. 17 of Sch. II of the Court Fees Act which applied to suits to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent or a Revenue Court. Referring to the suit filed by the unsuccessful claimant in that case their Lordships observe:

"Now this is an exact description of the effect of the appellant's suit. It is true that instead of asking the Court to alter or set aside the decree which is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge and which the Subordinate Judge had refused. But this is merely a verbal or formal difference, and S. 283 of the Civil Procedure Code, under which section the action is brought, recognises such a suit as not merely an appropriate but the only mode of obtaining review in such cases."

1. (1913) L.R. 41 I.A. 142. 18 C.W.N. 617 (P.C.).
2. (1914) I.L.R. 38 M. 829: 28 M.L.J. 127 (F.B.).
3. (1907) L.R. 35 I.A. 22: I.L.R. 35 C. 202: 17 M.L.J. 618 (P.C.).

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It is clear that in the view of their Lordships a suit filed under section 283 which corresponds to Order 21, Rule 63 is really a suit to set aside the order and if that right had accrued to a party long before dispossession, it is difficult to see how a subsequent dispossession can be held to be a part of his cause of action so as to attract the provisions of Order 2, Rule 2, Civil Procedure Code. In *Krishnappa Chetti* v. *Abdul Khader Saheb*[4] Sadasiva Aiyar, J., after referring to *Phulkumari* v. *Ghanshyam Misra*[3] observes:

"It is clear from the decision of the Privy Council in *Bibi Phulkumari* v. *Ghanshyam Misra*[3] that a suit under S. 283 is one to set aside the order passed upon the claim to the attached property and is a form of appeal therefrom, and the passing of the order forms the plaintiff's cause of action."

Turning to the authorities of this Court, prior to the decision of the Full Bench in *Kristnam Sooraya* v. *Pathma Bee*,[5] there was a conflict of authority but I think the matter is concluded by the above decision. In *Ambu* v. *Ketlilamma*[6] an unsuccessful claimant got a decree declaring her title and then she filed a separate suit for possession and the question arose whether section 43 of the old Code which corresponds to O. 2, R. 2 of the new Code would apply so as to bar the second suit. It was held by Muthuswami Aiyar and Best, JJ., that section 43 would not apply. Muthuswami Aiyar, J., observed:

"The only question of law that arises for decision upon the facts found is whether S. 43 of the Code of Civil Procedure bars the present suit. The ground of claim in Original Suit No. 508 of 1884 was the order that rejected the Claim Petition No. 1448 of 1883, and under S. 283 the plaintiff was entitled to institute a suit to establish the right claimed by him and thereby to prevent the order from acquiring the force of a decree in a regular suit. The ground of the present suit was the wrongful withholding of possession from the plaintiff after his title had been declared in the previous suit. The grounds of action not being identical, S. 43 is not applicable."

In *Kunhiamma* v. *Kunhunni*[7] a contrary view was taken by Sir Arthur Collins, C. J., and Wilkinson, J. The learned Judges thought that section 42 of the Specific Relief Act must be read with section 283 of the Civil Procedure Code and that a bare declaration of title should not be asked by an unsuccessful claimant if he is out of possession. If this decision is right and

3 (1907) L.R. 35 I.A. 22: I.L.R. 35 C. 202: 17 M.L.J. 618 (P.C).
4. (1913) I.L.R. 38 Mad. 535: 26 M.L J. 449.
5. (1905) I.L.R. 29 Mad. 151 (F.B.).
6 (1890) I.L.R. 14 Mad 23 1 M.L.J. 28.
7. (1892) I.L.R. 16 Mad. 140.

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if a party was bound to ask for possession in cases where his claim was disallowed and he was out of possession, S. 43 would apply. In this conflict of authority the matter was referred to a Full Bench and in *Kristnam Sooraya* v. *Pathma Bee*,[5] Sir Arnold White, C. J., Subramania Aiyar and Davies, JJ., followed the view taken in *Ambu* v. *Ketlilamma*[6] and overruled the decision in *Kunhiamma* v. *Kunhunni*.[7] The learned Judges observed:

"We are unable to accept the view taken by the learned Judges in the case *Kunhiamma* v. *Kunhunni*[7] In our opinion the proviso to S 42 of the Specific Relief Act does not operate so as to take away from a party against whom an order has been made under Ss. 280, 281 or 282 of the Code of Civil Procedure the special right conferred by S. 283 to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach. We think the law on this question was correctly laid down by Muthuswami Aiyar, J., in his judgment in *Ambu* v. *Ketlilamma*[6]"

This decision of the Full Bench has not been overruled by any subsequent decision of this Court. In *Sabella Appanna* v. *Malladi Appanna*[8] Seshagiri Aiyar and Oldfield, JJ., held that in a suit filed under Order 21, Rule 63, it was not necessary to add a claim for possession.

Reference has been made by Mr. Ramadoss for the appellant to *Basivi Reddi* v. *Ramayya*,[9] where it was held that a suit by an unsuccessful claimant for a declaration of his title to moveable property attached in execution of a decree and for the recovery of its value which was filed more than one year after the date of the attachment but within one year of the date of the order dismissing his claim petition is governed by Art. 11 of the Limitation Act and that the words "to establish the right which he claims to the property" which occur both in Art. 11 of the Limitation Act and Order 21, Rule 63, Civil Procedure Code, are wide enough to cover the case. No question arose in this case as to the applicability of Order 2, Rule 2, but there are observations in the judgment which support the appellant's view. In consequence of difference of opinion between Wallis and Oldfield, JJ., the matter came on before Abdur Rahim, O.C.J., and Seshagiri Aiyar and Phillips, JJ. The learned Judges held that in a suit under Order 21, Rule 63 other causes of action could be joined. Abdur Rahim, O. C J., was of opinion that the words "to establish the right" in their

5 (1905) I.L.R. 29 Mad. 151 (F.B.).
6. (1890) I.L.R 14 Mad. 23 at 25 · 1 M.L.J 28
7 (1892) I.L.R. 16 Mad. 140. 8 (1914) 16 M.L.T. 300.
9. (1916) I.L.R. 40 Mad. 733. 31 M.L.J. 394 (F.B.).

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ordinary grammatical sense do not necessarily mean the obtaining of a mere declaration of the plaintiff's title to the property and exclude all consequential reliefs. Seshagiri Aiyar, J., after referring to *Kunhiamma* v. *Kunhunni*,[7] held that the language employed in Article 11 is comprehensive enough to include not only a prayer for a declaration but also the consequential reliefs, if any, dependent on the declaration. Phillips, J., was of similar opinion. The learned Judge observes :

> "The words of the rule are 'a suit to establish the right which he claims to the property in dispute' and these words are wide enough to cover not only a mere suit for declaration but also one for relief consequential on such declaration To 'establish' a right means something more than to 'declare' a right and would seem to me to imply everything that is necessary to secure the proper enjoyment of the right. . . If O. 21, R. 63, is only to be applied to a suit for a mere declaration, the claimants would afterwards have to file a subsidiary suit for possession, and this would be in contravention of O. 2, R. 1."

Though several authorities were referred to by the learned Judges, it is curious that the decision of the Full Bench in *Kristnam Sooraya* v. *Pathma Bee*[5] was not referred to by any of them. The question before the learned Judges was simply one of limitation and nothing turned on O. 2, R. 2, and this probably accounts for it. The decision referred to by Seshagiri Aiyar, J., was expressly overruled by the decision of the Full Bench in *Kristnam Sooraya* v. *Pathma Bee*[5] and any observations as regards O. 2, R. 2 were purely *obiter*. If the learned Judges intended to lay down that causes of action arising subsequent to the dismissal of the claim ought to be joined in a suit to set aside the order, I would respectfully dissent from it for the reasons already given by me. All that the case referred to by Mr. Ramadoss decides is that in a suit under section 283 of the old Code which corresponds to Order 21, Rule 63, the unsuccessful claimant is not necessarily confined to a suit for a mere declaration of his right, but that he can join other reliefs. But that is far different from saying that he is bound to ask for consequential reliefs on pain of being barred by Order 2, Rule 2. Reference has also been made by Mr. Ramadoss to *Naranayyan* v. *Nageswarayyan*[10] where the learned Judges (Muthuswami Aiyar and Best, JJ.) observe that a plaintiff in a suit brought under section 283, Civil Procedure Code, should ask for consequential reliefs in addition to a declaration. But

5. (1905) I.L.R. 29 Mad. 151 (F.B.)
7. (1892) I.L.R. 16 Mad. 140.
10. (1893) I.L.R. 17 Mad. 389.

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this view was not accepted by the Full Bench which preferred to follow the decision in *Ambu* v. *Ketlilamma.*[6]

The next question is whether the Subordinate Judge was right in holding that the question as regards the validity of the plaintiff's sale-deed is *res judicata* by reason of the decision in the suit filed by him to set aside the claim order. I am of opinion that the Subordinate Judge was wrong in holding that the matter was *res judicata.* It is admitted that the value of the property as to which possession is sought in the present suit was above the limits of the pecuniary jurisdiction of the District Munsif who tried O.S. No. 1243 of 1914. That suit being one under R. 63, O. 21, the value for purposes of jurisdiction was the amount in respect of which the property was attached and consequently the District Munsif had jurisdiction. It is clear that if that suit had been for the recovery of possession of the property like the present suit, the District Munsif would have had no jurisdiction to entertain it.

The condition precedent to the applicability of the doctrine of *res judicata* is that the decision of the Court which is pleaded in bar should be the decision of a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised. In *Misir Raghobardial* v. *Sheo Baksh Singh* [11] their Lordships of the Privy Council held that the decision of a Court in order to be conclusive in another Court must have been the decision of a Court which would have had jurisdiction to decide the question raised in the subsequent suit. A similar view was taken in *Run Bahadur Singh* v. *Lucho Koer* [12] where their Lordships of the Privy Council approve the view taken by Sir Barnes Peacock, C.J., in *Mussamut Edun* v. *Mussamut Bechun.*[13] There are numerous other decisions which enunciate the same principle but it is unnecessary to refer to them in detail as it was conceded by Mr. Varadachariar for the respondent that if section 11 of the Code had to be applied, the matter would not be *res judicata.* His contention, however, is that the law of *res judicata* is not exhaustive and that it is open to us to go outside the section and hold that the decision in O.S. No. 1243 of 1914 would bind the parties. His argument is shortly this. A suit under section 283 or Order 21, Rule 63 is in substance and form an appeal against the order on the claim. If a party to a suit

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6. (1890) I.L.R. 14 Mad. 23: 1 M.L.J. 28.
11. (1882) L.R. 9 I.A 197: I.L.R. 9 C 439 (P C).
12. (1884) L.R. 12 I.A. 23: I.L.R. 11 C 301 (P C).
13. (1867) 8 W.R. 175 (F.B.).

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who is exonerated files an objection to the attachment, he comes in under section 47 and the matter is dealt with in execution and an appeal from the order is allowed by the Code and is final and conclusive in subsequent proceedings and it cannot be said that if the value of the subject-matter of the claim was beyond the limits of the pecuniary jurisdiction this would enable the party in subsequent proceedings to get behind the order. This is apart from any question under section 11 and on general principles. He argues by analogy that if the law instead of allowing a party to agitate a matter in execution proceedings require a separate suit, the same principle should be applied, as Order 21, Rule 63 declares that subject to the institution of a suit, the order on the claim shall be conclusive and the same conclusiveness should be attached to the decree passed in favour of the plaintiff in a suit filed to contest the claim order. Reference has been made to *Hook* v. *Administrator-General of Bengal*[14] where their Lordships of the Privy Council held that section 11 is not exhaustive of the circumstances in which an issue is *res judicata*. I am unable to accept this contention. It seems to me to be clear that where a case in terms falls within section 11, Civil Procedure Code, we cannot travel outside the section for the purpose of determining whether the matter is *res judicata* or not. *Gokul Mandar* v. *Pudmanund Singh*[15] is clear authority for this view. In dealing with the question of *res judicata* their Lordships state:

"They will further observe that the essence of a Code is to be exhaustive on the matter in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction"

We have not been referred to any case where it was held that although section 11 would in terms apply, the matter was still held not to be *res judicata* by the application of any different principle. The decisions are all the other way. It is contended by Mr. Varadachariar that as the question of the property not being liable to attachment is conclusive, the sale necessarily falls through and the defendant having no title cannot resist the plaintiff's claim for possession. I do not think this concludes the matter. The suit being one in ejectment even though the defendant has no title, he can still put the plaintiff to the proof of his title and the plaintiff has still to show that the sale-deed on which he relies as having given him a title superior to that of the defendant is a valid one. It was no doubt held

14 (1921) L.R. 48 I.A. 187: I.L.R. 48 C 499: 40 M.L.J. 423 (P.C.).
15. (1902) L.R. 29 I.A. 196: I.L.R. 29 C. 707 (P.C.).

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in the previous suit that the plaintiff's sale-deed is genuine, *bona fide* and supported by consideration. But as the value of the property now in dispute is beyond the limits of the pecuniary jurisdiction of the Court which decided the former suit and the decision is not *res judicata,* it is open to the defendant to agitate the question in the present suit. I think the Subordinate Judge is wrong in not going into the question. I would therefore reverse the decree of the Lower Court and remand the suit for disposal on issues 4, 5 and 6, which relate to want of consideration and to the sale being void under section 53 of the Transfer of Property Act. The costs of the appeal memo. will be refunded.

Reilly, J.

Reilly, J.—That an unsuccessful claimant under Rule 58 of Order 21, Code of Civil Procedure, may sue under Rule 63 of that order to establish the right which he claims to the property attached without praying for recovery of possession, even when out of possession and able to sue for that relief, S. 42 of the Specific Relief Act not being applicable to such a case was in effect decided by the Full Bench in *Kristnam Sooraya* v. *Pathma Bee,*[5] a decision which would be binding on us even if we did not agree with it. With that decision *Basivi Reddi* v. *Ramayya,*[9] on which Mr. Ramadoss relies, is not incompatible, as the actual decision in the latter case, so far as it was not confined to a question of limitation, was that in the suit provided for in R. 63 of O. 21 the claimant may include consequential relief such as recovery of possession.

It is true that two of the learned Judges who heard the Letters Patent Appeal in that case, Seshagiri Aiyar and Phillips, JJ., supported their conclusion by references to Rule 2 of Order 2. But their view of that rule, from which with great respect I must differ, is not binding on us. The first contention raised by Mr. Ramadoss in this case is that the plaintiff, having omitted in his former suit O.S. No. 1243 of 1914 to sue for possession, is precluded by Rule 2 of Order 2 from doing so in the present suit. That would be correct only if his loss of possession was the cause of action or included in the cause of action of his former suit. The former suit he brought in accordance with Rule 63 of Order 21 to establish the right which he had failed to establish in his claim petition, and this cause of action was clearly, as he stated in his plaint, the adverse order made on his claim petition. The fact that

5. (1905) I.L.R. 29 Mad. 151 (F.B.).
9. (1916) I.L.R. 40 Mad. 733: 31 M.L.J. 394 (F.B).

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he had then available another cause of action, his loss of possession in consequence of the execution-sale to defendant 1, which he might have added to his suit and on which he could have prayed for further relief, could not affect the nature of the cause of action on which alone he chose to sue. If any authority is needed to show what is the cause of action in the kind of suit provided for in Rule 63 of Order 21, it is made clear by their Lordships of the Privy Council in *Phulkumari* v. *Ghanshyam Misra*.[3] The plaintiff could not have sued for possession merely on the ground that an adverse order had been made against him on his claim petition; for that purpose it would have been necessary for him to allege a further cause of action, his subsequent dispossession in consequence of the sale to defendant 1. As it is not on the cause of action of his former suit that he now sues for possession, I agree that his present suit is not barred by Rule 2 of Order 2.

I agree also that defendant 1's contentions, which are the subject of issues 4 and 5 in the present suit, are not *res judicata* by virtue of the decision in the former suit. That was a suit tried by a District Munsif, who was not competent to try the present suit. To treat his findings on these questions as *res judicata* would not be to apply the principle of section 11, Civil Procedure Code, to proceedings other than a former suit, as was done by their Lordships of the Privy Council in *Hook* v. *The Administrator-General of Bengal*[14] and *Ramachandra Rao* v. *Ramachandra Rao*,[16] but to extend the principle of that section in a manner implicitly forbidden by its wording so as to treat the decision of an inferior tribunal as binding on a superior tribunal, that would be not to apply but to violate the principle of the section. In my opinion Mr. Varadachariar is right in his contention for the plaintiff that by the decision in the plaintiff's former suit his claim that the property was not liable to attachment in execution of defendant 1's decree, which was dismissed in the execution proceedings, has been allowed, the attachment to which he objected has been set aside, the property attached has been released and the basis of the execution-sale to defendant 1 has therefore gone. That is what has been done by the act of a competent Court as the final result of the former suit. It can be proved, if necessary, in the present suit by producing the decree in the former suit and cannot be

3 (1907) L.R. 35 I.A. 22. I.L.R. 35 C. 202 17 M.L.J. 618 (P.C).
14 (1921) L.R. 48 I.A. 187 I.L.R. 48 C 499· 40 M.L.J. 423 (P.C).
16. (1922) L.R. 49 I.A. 129: I.L.R. 45 Mad. 320: 43 M.L.J. 78 (P.C).

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disputed by defendant 1. Indeed I do not understand from his pleadings that defendant 1 in the present suit has any intention of disputing it. But the result of that is that, though he is in possession, defendant 1's title to the property has gone, not that he is bound to admit the plaintiff's title or is precluded by the findings of an inferior Court, incompetent to try the present suit, from requiring the plaintiff to prove again his title in the present suit if he thinks it worth while to adopt that course. I agree that this appeal should be allowed and that the suit should be remanded to the Subordinate Judge for fresh disposal after trying issues 4, 5 and 6.

N.S. *Appeal allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

S. R. M. S. Raman Chetty .. *Petitioner* (Decree-holder)*

v.

A. R. M. Ramaswami Pillai .. *Respondent (Judgment-debtor)*

Raman Chetty v. Ramaswami Pillai.

Limitation Act (IX of 1908), Art 182, clause (5)—Step-in-aid of execution—Order for arrest of judgment-debtor—Batta memorandum stating batta paid for arrest—Civil Rules of Practice, Rule 166.

Where, after an order for arrest of the judgment-debtor was ordered, the decree-holder filed a batta memorandum, in accordance with Rule 166 of the Civil Rules of Practice, containing the statement "batta for arrest,"

Held, that this batta memorandum was an application to take a step-in-aid of execution within the meaning of clause (5) of Art. 182 of the Limitation Act.

Vijiaraghavalu Naidu v. *Srinivasalu Naidu,* (1905) I.L.R. 28 Mad. 399 applied

Arunachalam Chettiar v. *Latchumanan Chettiar,* (1924) 47 M.L.J. 537 explained.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the Subordinate Judge of Sivaganga in E.P. No. 371 of 1926 in S.C.S. No. 764 of 1921.

K. S. Venkatarama Aiyar for petitioner.

K. S. Sankara Aiyar for respondent.

The Court delivered the following

JUDGMENT.—The petitioner is an executing decree-holder, and to bring his application within time he must establish that

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*C.R.P. No. 138 of 1927. 17th January, 1928.

Ramán Chetty v. Ramaswami Pillai.

the batta memorandum filed by him on 11th July 1922 was an application to take a step-in-aid of execution. This, the Lower Court has held, he cannot establish and hence the petition.

On 3rd July, 1922 he applied for the arrest of the judgment-debtor. The arrest was ordered on 10th July 1922. Then in accordance with rule 166 of the Civil Rules of Practice the applicant brought into Court the necessary fees with the memorandum in question ,which contains in columns 1 and 5 the statement "Batta for arrest."

Were it simply a matter of applying the words of Art. 182 in the Indian Limitation Act to the circumstances of this case I do not think that there would be any difficulty. Applying to a Court to take a step-in-aid is asking a Court to go forward, to do something more, in fact, to take another step. The steps in this process are clearly defined. There is the application for arrest, its scrutiny, the adjournment for a period within which the fee must be paid, the receipt of the fee, and the order for process to issue. This batta memorandum is a direct application that the Court shall receive the fee and an implied application that it shall issue process. It is a step-in-aid; which seems to be the view taken in *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu.*[1]

In *Arunachalam Chettiar* v. *Latchumanan Chettiar*[2] a similar batta memorandum came up for consideration; at least so I presume from the phrase "batta memos. for warrant of arrest," although the actual paper is neither quoted in the judgment nor to be found in the record.

The learned Judge considered various rulings and held that in the batta memorandum referred to in *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[1] there was a distinct application for process over and above what is now in the form. I do not think so myself, and in my opinion, as observed above, the entry in the memorandum "batta for arrest of plaintiff" is an application for the issue of warrant, which I believe was also the view of the learned Judges in *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu,*[1] though no doubt it is difficult to apply rulings which contain no citation of the document in question. In fact for that reason alone I should be prepared to ignore the case-law and trust to the plain interpretation of the statute. It is quite possible that the memorandum referred to in *Arunachalam Chettiar* v. *Latchumanan Chettiar*[2] did not even contain these words "Batta for arrest of plaintiff."

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1. (1905) I.L.R. 28 Mad. 399. 2. (1924) 47 M.L.J. 537.

Raman Chetty v. Ramaswami Pillai.

I had thought of referring the matter to a Bench, but on a consideration of the cases I hold that *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[1] is clear authority (cf. *Alagamuthu Pillai* v. *Devasagaya Fernandes*[2]) which is not cited in *Arunachalam Chettiar* v. *Latchumanan Chettiar*.[3] I allow this petition with costs. The batta memorandum is an application to take a step-in-aid, and the petitioner's present application is not barred by limitation and must be proceeded with in due course.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Rengan, minor, by guardian Ramasami Aiyangar .. *Appellant** (*Deft.*)

v.

Palaniyandi and another, minors, by their brother and guardian Vellammal .. *Respondents* (*Plffs.*).

Rengan v. Palaniyandi.

Hindu Law—Widow—Alienations in future by—Reversioner's consent for consideration to—Effect—Alienation made by widow thereafter—Reversioner's right to question—Right of his heirs—Estoppel.

It is unnecessary that, in order to release the rights which a reversioner may have to the property of the last male owner, there should be an alienation or an alienation in contemplation by the widow at the date of the release.

A reversioner who for consideration consents to future alienations in general being made by the widow is estopped from questioning any alienation made by her thereafter.

Annagowda Patil v. *Bhausaheb*, (1927) L.R. 54 I.A. 396: 53 M.L.J. 350 (P.C.) applied.

Raghupathy v. *Kannamma*, (1912) 23 M.L.J. 363 followed.

Appeal against the decree of the Court of the First Additional Subordinate Judge of Madura in O.S. No. 45 of 1920.

P. R. Srinivasan for appellant.

K. S. Jayarama Aiyar for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS. *Kumaraswami Sastri, J.*—This appeal arises out of a suit filed by the plaintiffs as the reversioners of one Sankaralingam Pillai to set aside the alienations made by his widow. Sankaralingam Pillai died in 1872 leaving his widow Kanthimathi Ammal, who died in 1911 and daughter Thangammal, who died

*A.S. No. 455 of 1923. 2nd February, 1928.

1. (1905) I.L.R. 28 Mad. 399. 2. (1924) 47 M.L.J. 537.
3. (1915) 3 L.W. 34.

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in 1902. On Sankaralingam Pillai's death, Kanthimathi Ammal succeeded to the properties and she made the alienation now complained of to the appellant's father, the 35th defendant in the suit. Two questions were raised: (1) Whether the plaintiffs are the reversioners of Sankaralingam Pillai, and (2) If so, whether the alienation in favour of the 35th defendant is binding. The Subordinate Judge was of opinion that the plaintiffs were the reversioners and that the alienation was not binding. It is contended for the appellant that the plaintiffs' father who was the next presumptive reversioner received Rs. 600 and executed a deed of release Ex. IV in favour of Kanthimathi Ammal, the widow and Thangammal, the daughter, who was then alive, relinquishing all his rights in the properties including the property now in dispute. The genuineness of Ex. IV is not disputed; nor is it disputed that the plaintiffs' father received Rs. 600 as stated in that document. The circumstances that led to Ex. IV are set out in the document itself. There were certain properties, which were karnam inam, in the possession of Sankaralingam Pillai and on his death the karnam inam properties were registered in the name of the daughter Thangammal. Objection was taken by the plaintiffs' grandfather that he was entitled to the inam and that it should be registered in his name and the revenue authorities referred him to a regular suit. In the meantime he died. It is stated in the release deed that the father of the plaintiffs wanted to take steps to file a civil suit but that at the mediation of certain persons this release was executed. It appears from the terms of the release deed that the widow was making alienations, creating encumbrances, mortgages and *othis* over it and was denying the title of the plaintiffs and their father. The deed of release purports to be an absolute release and the plaintiffs' father binds himself and his heirs and says that he has no right to or further claim on the property. The Tamil word "பின் தொடர்ச்சி" suggests any claim which he may be entitled to make on the death of the widow and the daughter. The property now in question is item No. 9 in the document. It is a tiled and thatched house situate in the town of Madura. It is expressly mentioned in the document that the property was purchased by Kanthimathi Ammal's husband Sankaralingam Pillai and was in the possession of his widow. It is clear from this document and from Ex. A-2 that this house could not have been and was not attached to the inam. The properties attached to the inam are specifically set out and this item is not one of them.

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It is difficult to see how a house in Madura could ever have formed part of an inam. It is difficult to follow the contention of Mr. Jayarama Aiyar that the parties were under a mistaken impression that the house was a part of the inam property. The document distinctly negatives any such mistake because it specifically states that the house was purchased by Sankaralingam Pillai and that it was in the possession and enjoyment of the widow. It is argued that even if the only right that was released by this document was the reversionary right which the plaintiffs' father had as the next presumptive reversioner on the death of the widow and the daughter, the agreement is invalid as what he agrees to release under that document is that he would claim no rights to the property as to which he had only a *spes successionis*. At the date of the document item No. 1 was agreed to be sold and it was agreed that out of the sale proceeds he should get Rs. 600. The daughter died in 1902 long before the widow and the present alienation was in 1907 after the death of the daughter.

The first question is whether this release refers only to a release of the rights which the executant had to the karnam office and the lands attached to it or whether it also refers to the rights which he would have had to the property on the death of the widow. The Subordinate Judge thinks that it relates only to the karnam office and therefore the decisions referred to by the appellant did not apply to the facts of the case. Having regard to the wording and the terms of the document and to the fact that the property was property which was not attached to the office, there can be little doubt that what he released was his claim both present and as reversioner to the property. He releases all his rights whatever they may be reserving no kind of claim that may arise. He got consideration for it. It is unnecessary that, in order to release the rights which he may have to the property, there should be an alienation or an alienation in contemplation at the date of release *Raghupathy* v. *Kannamma*[1] is an authority for this proposition. It is open to a reversioner to agree not to raise any claim which he may be entitled to make on the death of the widow in respect of the alienation made by her and as he received consideration for the agreement I think that the case falls within the principle of the decision of their Lordships of the Privy Council in *Annagowda Patil* v. *Bhausaheb*.[2] It was held in that case

1 (1912) 23 M.L.J. 363.

2. (1927) L.R. 54 I.A. 396: 53 M.L.J. 350 (P.C.).

that, where a reversioner enters into an agreement with a widow in respect of properties and is alive at the date of the death of the widow, it is not open to him to question an alienation made by her. In the present case I find it difficult to see how it is open to the plaintiffs to question the alienation on the ground that there are any facts which distinguish the case for the one reported in *Annagowda Patil* v. *Bhausaheb*.[2] Their father who was alive for six years after the date of the death of the widow did not question the alienation. He had received consideration; and if he had sued, it is clear that he would have been estopped from disputing the alienation made, and his sons therefore who would not at the death of the widow be entitled to the property cannot claim any right to set aside the alienation. The only question in this case is whether Ex. IV reserves any reversionary right which the plaintiffs' father had at the date of Ex. IV. The Subordinate Judge has disposed of the case on that ground, and as we differ from him and as there is no other question raised as regards the validity of the sale, we think that the decree of the Subordinate Judge will have to be reversed as regards this item and the suit as regards the 35th defendant dismissed with costs in this and the Lower Court.

Reilly, J.—Mr. Jayarama Aiyar has contended that the only right which the plaintiffs' father, Subbiah Pillai, released under Ex. IV was his existing right, which he claimed at that time, to a half share in the karnam inam property. But I agree that, so far as item No. 9 is concerned—and that is the only item with which we are concerned in this appeal—Subbiah Pillai could not have been under any misapprehension that he was dealing with any part of the karnam inam. If that is so, then the only right which he could suppose himself to have had in item No. 9 was his reversionary right, and, so far as Ex. IV deals with his right to that item, he must have been intending to deal with his reversionary right. In Ex. IV he states that he has received Rs. 600 and then he goes on to say: "I have hereby given an out and out release to the effect that neither myself nor my heirs shall have any right to or further claim on the property." In Ex. IV he does not explicitly consent to any particular alienation by Kanthimathi Ammal or Thangammal, in whose favour Ex. IV runs, though he does implicitly consent to the alienation of item No. 1 covered by this document, and it has been pointed out to us that D.W. 5 gives evidence that Ex. XX, an out and out sale of another item covered by the

2. (1927) L.R. 54 I.A. 396: 53 M.L.J. 350 (P.C.).

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Reilly, J.

document, was executed by Kanthimathi Ammal and Thangammal on the very date of Ex. IV and attested by Subbiah Pillai. But apart from that, although there are no words in Ex. IV stating that Subbiah Pillai consents to Kanthimathi Ammal or Thangammal making any alienation by sale or gift or exercising absolute rights in the property, I do not think that we can give proper force to the expressions which he used in the document and which I have quoted unless we understand him to mean that he is thereby consenting to their exercising full powers of sale and gift. In *Annagowda Patil* v. *Bhausaheb*[2] their Lordships of the Privy Council have recently stated that it is settled law that a reversioner would be precluded from exercising his right to avoid a widow's alienation either by an express ratification or by acts which treat it as valid or binding. In that case a reversioner who had himself received part of the benefit of a widow's transaction was held to be estopped from questioning it when he survived her. On what principle can we say that a reversioner is estopped after the reversion falls in to him from questioning a particular alienation of which he has received part of the benefit and to which he has consented and is not estopped when for consideration he has consented to future alienations in general being made by the widow? In *Raghupathy* v. *Kannamma*[1] Mr. Justice Sundara Aiyar says: "It is to my mind quite clear that, if a reversioner for consideration gives general consent to a widow to alienate and says that she might make any alienation that she pleases it would estop him with respect to any alienation made by her." With that I respectfully agree. That being so, I agree that this appeal must be allowed with costs.

A.S.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE DEVADOSS.

Namagiri Ammal .. *Appellant** (*Plff.*)

v.

Muthu Velappa Goundan and another .. *Respondents* (*Defts.*).

Namagiri Ammal v. Muthu Velappa Goundan.

Civil Procedure Code (V of 1908), O 6, R. 4; O. 7, R. 1—Plaint—Particulars of claim in—Misdescription of—Effect—Maxim "Falsa demonstatio"—Applicability of—O 21, R 51—Negotiable Instrument not in custody of Court or public officer—Attachment of—Notice to debtor restraining him

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*Appeal No. 96 of 1924. 7th March, 1928.

1. (1912) 23 M.L.J. 363.

2. (1927) L.R. 54 I.A. 396: 53 M.L.J. 350 (P.C.).

from paying to creditor if effective against debtor—O. 38, R. 9—Attachment before judgment—Effect on, of dismissal of suit—Dismissal for default and restoration subsequently—Dismissal by first Court and reversal thereof on appeal—O 9, R 9—Restoration of suit dismissed for default—Interlocutory orders before dismissal—Effect on.

When the plaint contains sufficient particulars as to the identity of the pro-note sued on, the suit should not fail by reason of an error or a mistake in its description which does not mislead the defendant as to the nature and the particulars of the claim. The maxim *"Falsa demonstratio non nocet"* is applicable to such a case

Where, therefore, the plaint in a suit on a promissory note gave the names of the promisor and the promisee and the date of the pro-note sued on correctly but made a slight mistake with regard to the actual amount of the note because the same was not in the possession of the plaintiff when he filed the suit, *held,* that the suit ought not to fail by reason of such mistake.

Where the notice of attachment of a promissory note served on the debtor or promisor stated that he was by injunction ordered not to pay money towards the pro-note, *held,* that the attachment was an effective attachment so far as the promisor was concerned.

The dismissal of a suit does not necessarily entail the withdrawal of the attachment before judgment without a specific order of the Court for the purpose.

Held, therefore, that an attachment before judgment continued in force even though the suit was dismissed for default and restored afterwards

Semble Where a suit is dismissed in the Lower Court and the dismissal is set aside in appeal, the attachment before judgment would be deemed to have continued throughout.

Per *Phillips, J.*—When an order dismissing a suit for default is set aside on an application made for the purpose, the suit remains as it was on the day that it was dismissed, and all proceedings taken up to that date must be deemed to be in force when the dismissal is set aside, and all interlocutory orders would be revived on the setting aside of the dismissal. Similarly an order for attachment of property would also be revived.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O.S. No. 154 of 1922.

C. S. Venkatachariar for appellant.

T. M. Krishnaswami Aiyar and *S. S. Ramachandra Aiyar* for 1st respondent.

T. S. Anantaraman for 2nd respondent.

The Court delivered the following

JUDGMENTS. *Devadoss, J.*—The plaintiff as Receiver brought this suit for recovery of the amount due on a promissory note executed by the 1st defendant on 10th August, 1919 in favour of one Krishna Aiyangar. It was contended by the

Devadoss, J.

Namagiri Ammal v. Muthu Velappa Goundan.

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1st defendant, among other things, that there was no such pro-note as that mentioned in the plaint, that the pro-note executed by him in favour of Krishna Aiyangar had been partially discharged and that the plaintiff is not entitled to bring a suit on the pro-note as it had not been attached by a Court. The Subordinate Judge dismissed the suit upholding the contention of the 1st defendant. Plaintiff has preferred this appeal.

The plaintiff brought O.S. No. 152 of 1922 in the District Munsif's Court of Gopichettipalayam against her father, Krishna Aiyangar, for possession of lands and mesne profits and applied for attachment before judgment of the pro-note executed by the 1st defendant to Krishna Aiyangar for Rs. 6,000 and the Court ordered attachment on 21st January, 1920 and notice of it was served on the 1st defendant on 23rd January, 1920. The plaintiff thereupon applied for the appointment of a Receiver for the collection of the amount due on the pro-note and she was appointed interim Receiver on 15th August, 1922. The 1st defendant filed a counter-statement and objected to the appointment of a Receiver. The District Munsif, notwithstanding the objection of the 1st defendant, appointed plaintiff Receiver and she has brought this suit in her capacity as Receiver for the amount due on the pro-note. She has made her stepmother, the widow of Krishna Aiyangar, 2nd defendant. The contention of the 1st defendant is that the pro-note sued on is not the one executed by him in favour of Krishna Aiyangar and the suit must, therefore, fail. In paragraph 3 of the plaint the pro-note is described as having been executed to the plaintiff's father, Krishna Aiyangar, by the 1st defendant on 10th August, 1919 for Rs. 6,400 bearing interest at Rs. 10 per Rs. 100 per annum. The defendant admits having executed a pro-note to Krishna Aiyangar on 10th August 1919 for Rs. 5,892 bearing interest at 8 per cent. per annum. In Ex. F, the attachment order served on the 1st defendant on 23rd January, 1920, the pro-note is described as one executed to Krishna Aiyangar for Rs. 6,000. There is nothing on record to show that the 1st defendant objected to the attachment of the pro-note for Rs. 6,000 when he was served with the notice Ex. F; nor did he mention in the counter-statement Ex. C filed by him, when opposing the appointment of Receiver, that the pro-note in respect to which he was restrained was not in existence and therefore the order was of no avail. On the other hand, he contended that the suit on the pro-note would be beyond the jurisdiction of the Munsif's Court and, therefore, it could not appoint a

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Receiver in respect of the pro-note. When the plaint contains sufficient particulars as to the identity of the pro-note sued on. the suit should not fail by reason of an error or a mistake in its description which does not mislead the defendant as to the nature and the particulars of the claim. Here the names of the promisor and the promisee and the date of the pro-note are correctly given and the amount mentioned is Rs. 6,000, whereas the actual amount of the pro-note is Rs. 5,892. The plaintiff was not in possession of the note at the time when she filed the suit. It cannot be said in the circumstances that the 1st defendant was taken by surprise or that he was not aware of what the plaintiff was suing on. When a plaint contains sufficient averments and indicates with reasonable precision what the claim sued on is, the suit should not fail by reason of the omission or incorrect description of any particular. It is unnecessary to consider in detail the case-law on the point. In *Viswanadha Pandara Sannadhi* v. *The South Indian Bank, Tinnevelly*[1] the learned Judges observed:

"What the Courts have to find out in such cases is whether the claim agrees substantially with the subject-matter of the purchase. As reasonable amount of certainty is all that can be expected having regard to the knowledge and the circumstances of the plaintiff, the principle enunciated by Lindley, M.R., in *Cowan and Truefitt, Ltd*[2] applies to this case."

In that case Lindley, Master of the Rolls, observed with regard to the maxim *Falsa demonstratio non nocet*:

"I do not know that the principle can be better put than it is in Jarman on Wills, 5th Edition, page 742, where it is said the rule means 'that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise.' "

Mr. T. M. Krishnaswami Aiyar who appears for the 1st defendant fairly conceded that he could not contend that the pro-note sued on was not the pro-note attached. I have no hesitation in holding that the pro-note sued on is the one executed by the 1st defendant to Krishna Aiyangar on 10th August, 1919 for Rs. 5,892.

The next question is, was it under attachment at the time when the Receiver was appointed? Under Order 21, Rule 51, Civil Procedure Code, the attachment of a negotiable instrument when not in Court or in the custody of a public officer should be made by actual seizure. In order to make the attachment effectual actual seizure is necessary, for, if it is not seized the promisee

1. (1917) 6 L.W. 712 at 714. 2. (1899) 2 Ch. 309.

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may negotiate it and the attachment by mere notice will not avail against a holder in due course who gets it without the knowledge of the attachment from the promisee—vide *Subramania Aiyar* v. *Chockalinga Mudaliar.*[3] But the notice of attachment to the debtor or promisor is sufficient protection against his paying the amount due on the instrument to the promisee or any one else claiming under him. The notice served on the 1st defendant on 23rd January, 1920 stated that he was by injunction ordered not to pay money towards the promissory note which he had executed to Krishna Aiyangar for Rs. 6,000. So far as the 1st defendant is concerned this was effective attachment.

It is strongly urged that granting that this is effective attachment as the suit was dismissed for default, the attachment ceased to have effect and as there was no fresh attachment of the pro-note on the restoration of the suit, there was no attachment subsisting at the time of the appointment of the Receiver. The case was taken up for trial on 21st July, 1921. Plaintiff and her pleader were absent and the suit was dismissed for default of plaintiff's appearance. She applied for restoration of the suit on 25th July, 1921 and the District Munsif restored the suit to file. The question is, does the dismissal of the suit necessarily entail the withdrawal of the attachment before judgment without a specific order of the Court for the purpose? I have no hesitation in answering the question in the negative. O. 38, R. 9, Civil Procedure Code says: "Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed." The rule makes it obligatory on the Court to pass an order withdrawing the attachment when security is furnished or when the suit is dismissed. When the words of a statute are clear it is not proper to ignore their plain meaning and give them a different meaning. As soon as a suit is dismissed the person against whom an order for attachment was made has simply to apply to the Court for withdrawing the order. The application may be oral or in writing and the Court, when such an application is made, is bound to grant it unless there are circumstances which would justify postponing the granting of the prayer or refusing it. When a party does not choose to avail himself of a remedy which the law gives him Courts are not justified in giving him

3. (1922) I.L.R. 46 Mad. 415: 44 M.L.J. 206.

the remedy which owing to his carelessness or negligence he does not choose to ask. If a garnishee pays the amount due from him into Court, can he withdraw the amount without an order of Court by reason of the dismissal of the suit? If moveable properties or negotiable instruments attached are in the custody of the Court the dismissal of the suit in which the attachment was made would not place the person from whom the moveables or negotiable instruments were taken in possession of them. Such a person will have to apply to the Court for getting them back. I do not see why a different rule should be held to apply when property attached, whether moveable or immoveable, is not in the actual custody of the Court. In my view the dismissal of a suit does not amount to the withdrawal of the attachment before judgment and, if the order of dismissal is set aside on appeal and a decree is passed in favour of the plaintiff, the attachment before judgment would enure for his benefit. Here, in this case, the suit was dismissed for default of plaintiff's appearance and was restored by the Court. The restoration of a suit under Order 9, Rule 9, Civil Procedure Code stands on a slightly different footing from the order of the Appellate Court reversing the dismissal of the suit. A Court may dismiss a suit for default and may restore it to file on proper cause being shown in the course of the same day. It would work great hardship if it be held that in such a case the attachment before judgment ceased to have force because the suit was off the file for a few hours. I think the legislature has advisedly framed Order 38, Rule 9, Civil Procedure Code and I do not see sufficient ground for ignoring the plain terms of Order 38, Rule 9 or to give the plain words of the rule a meaning which they are not capable of bearing. The argument founded on the analogy of Order 21, Rule 57, Civil Procedure Code has no application. In that rule it is specifically stated that upon the dismissal of the application the attachment shall cease. No doubt the Allahabad High Court and the Calcutta High Court have taken a different view. In *Ram Chand* v. *Pitam Mal*[4] Mahmood, J., was of opinion that "an attachment before judgment under section 488 like a temporary injunction under section 492 becomes *functus officio* as soon as the suit terminates" and he goes on to add that if he were to give the literal interpretation to Section 488 of the old Code corresponding to Order 38, Rule 9 of the present Code he should be driven to the logical conclusion that such interim order of attachment

4. (1888) I.L.R. 10 All. 506.

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subsisted for ever whether there was or was not an appeal unless and until such an order was expressly withdrawn. With great respect I am unable to see any absurdity in holding that an attachment before judgment subsists, till it is withdrawn, when the terms of the section are clear. This case was followed in *Sasirama Kumari* v. *Meherban Khan*.[5] There are no cases of our High Court dealing with this question although Wallace, J., is of the same view as the one I have expressed and Ramesam, J., is prepared to agree with the decisions in *Ram Chand* v. *Pitam Mal*[4] and *Abdul Rahman* v. *Amin Sharif*.[6] I hold that an attachment before judgment continues to have effect till it is withdrawn by an order of Court and in this case the attachment continued in force even though the suit was dismissed for default and restored afterwards.

Apart from the question of attachment there is the further fact that the plaintiff has been appointed Receiver in respect of the suit pro-note and as such she is entitled to collect the amount due on it. Under Order 40, Rule 1, Civil Procedure Code the Court has power to appoint a Receiver of any property "whether before or after decree." The Court appointed the plaintiff interim Receiver on 15th August, 1922 and the order absolute is "petitioner was appointed Receiver so that the pro-note for Rs. 6,000 and odd is not barred by limitation." The 1st defendant when he objected to the appointment did not say that there was no such pro-note as that mentioned in the application for the appointment of Receiver. He stated in his counter-statement, Ex. C, that he was not aware of the attachment of a portion of the pro-note for Rs. 6,000 and further stated that no right accrued to the petitioner with regard to the suit pro-note and that a suit on the pro-note would be beyond the jurisdiction of the Munsif's Court. After hearing the 1st defendant the Court appointed the plaintiff Receiver in respect of the pro-note and she is therefore entitled to sue on it.

The next contention of the 1st defendant is that the pro-note was partially discharged. This depends on the evidence in the case.

[The learned Judge then discusses the evidence and concludes]

I have no hesitation in holding that the partial discharge pleaded is not true. The plaintiff, therefore, will have a decree for

4. (1888) I.L.R. 10 All. 506

5. (1911) 13 C.L.J. 243.

6. (1918) I.L.R. 45 C. 780.

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Rs. 5,892 with interest at 8 per cent. from 10th August 1919 to date of decree and thereafter at 6 per cent. with proportionate costs here and in the Court below. The 2nd respondent's vakil asked that the order as to costs in his client's favour should not be varied as she was not a necessary party to the suit. The plaintiff had to make the 2nd defendant, the legal representative of Krishna Aiyangar, a party to the suit, as plaintiff was not in possession of the suit pro-note. The order of the Subordinate Judge directing the plaintiff to pay her costs cannot stand. That order will be vacated. The plaintiff's costs will be borne by the 1st defendant and the 2nd defendant will bear her costs throughout.

Phillips, J.

Phillips, J.—I agree, but as the meaning of O. 38, R. 9. Civil Procedure Code does not appear to have been formed the subject of judicial decision in this Court, I think it desirable to express my own views on the subject. The question is whether the provision in Order 38, Rule 9, that, where an order has been made for attachment before judgment, the Court shall order the attachment to be withdrawn when the suit is dismissed, is mandatory or merely directory. There is no direct authority in this Court on the point, but it was held in Allahabad (*Ram Chand* v. *Pitam Mal*[4]) that the provision in the rule was merely directory and that when the Court failed to pass an order withdrawing the attachment, nevertheless the attachment fell to the ground on the dismissal of the suit, so that when the Lower Court's decree was reversed in appeal the property could not be proceeded against in execution as if the original attachment was still subsisting. This view was followed by a Bench of the Calcutta High Court in *Abdul Rahman* v. *Amin Sharif*[6] where it was held that on dismissal of the suit the attachment before judgment fell to the ground, whether an appeal is filed or not. These two cases were considered in *Meyyappa Chettiar* v. *Chidambaram Chettiar,*[7] but the actual point did not then arise for consideration. Ramesam, J., agreed with the cases above quoted but Wallace, J., was of a contrary opinion. The case reported in *Sasirama Kumari* v. *Meherban Khan*[5] is not to the point, for in that case an order withdrawing the attachment had been passed and it was held that the appellate decree did not revive the attachment. The matter is therefore *res integra*

4. (1888) I.L.R. 10 All. 506 at 511.
5. (1911) 13 C.L.J. 243.
6. (1918) I.L.R. 45 C 780.
7. (1923) I.L.R. 47 M. 483; 46 M.L.J. 415 (F.B.).

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so far as this Court is concerned and it is necessary to consider the language of the Code in this respect.

Order 38, Rule 9, Civil Procedure Code requires the Court to withdraw the attachment on dismissal of a suit, the words used being "shall order the attachment to be withdrawn." Similarly in Rule 6 of the same order when property has been attached under Rule 5 and the defendant furnishes security it is directed that the Court shall order the attachment to be withdrawn or make such other order as it thinks fit. This rule clearly contemplates the making of an order of some sort by the Court and *prima facie* R. 9 also requires some such order. When an attachment is made in execution, Order 21, Rule 57 provides for its cessation, and that rule says: "Upon the dismissal of such application (*viz.*, for execution) the attachment shall cease."

The language in this section is very different from that in Order 38, Rule 9, but if the Allahabad and Calcutta decisions are correct the effect of the two sections is exactly the same although the language is so very different. Undoubtedly the Court should of its own accord direct the attachment to be withdrawn as soon as it dismisses the suit, and if such an order is not passed, it is open to the parties to apply for the making of such an order, but there are cases where the Court might not consider it necessary to pass such an order at once. For instance, a suit might be dismissed for default and restored again for reasons shown on one and the same day. In such a case there would be no real necessity for an order withdrawing the attachment. The facts of this case are somewhat akin, for the suit was dismissed at a preliminary stage and was subsequently restored though after a considerable interval. Under Order 9, Rule 9 when an application is made to set aside the dismissal of a suit for non-appearance of the plaintiff the Court shall make an order setting aside the dismissal. That order of dismissal having been set aside the suit remains as it was on the day that it was dismissed, and all proceedings taken up to that date must be deemed to be in force when the dismissal is set aside, and in my opinion all interlocutory orders would be revived on the setting aside of the dismissal. Similarly, an order for attachment of property would also be revived. It would certainly be unreasonable to expect a plaintiff who had already obtained an order for attachment before judgment to comply with the whole procedure laid down in Order 38 and to have a fresh attachment made. If an order withdrawing attachment had been made on the dis-

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missal of the suit, then it might be argued that a further order for attachment must be made, because the order withdrawing the attachment and the order of dismissal may be deemed to be simultaneous, and therefore the setting aside of the order of dismissal would not necessarily set aside the order withdrawing the attachment, but that point does not arise for consideration now. When no order has been passed withdrawing the attachment and the dismissal of the suit is subsequently set aside by the Trial Court the attachment must be deemed to subsist as the setting aside of the dismissal order must revive all orders in force till the dismissal. The question of whether when a suit is dismissed in the Lower Court and the dismissal is set aside in appeal the attachment must be deemed to have continued throughout is an aspect of the question which need not be decided now, but *prima facie* the result of the failure of the Court to pass an order withdrawing the attachment would appear to be that the attachment continues in force.

A.S.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI.

In the matter of The United India Life Assurance, Co., Ltd., and The Indian Companies Act, 1913 and The Life Assurance Companies Act, 1912.

v.

P. V. Sarma .. *Applicant**.

In the matter of The United India Life Assurance Co., Ltd.

Costs—Bill by Advocate—Application under section 45 of Specific Relief Act—Advocate not appearing by Attorney—Taxation of costs—Itemised bill—Fees Rules (Madras High Court), Order 6, Rule 20.

There is no provision in the Fees Rules by which an application under section 45 of the Specific Relief Act will entitle an advocate not appearing by attorney to bring an itemised bill of costs charging for attendance and various other matters as if the advocate himself was both attorney and advocate. Order 6, Rule 20 of the Fees Rules does not apply to such a case.

V. Ramaswami Aiyar for petitioner.

K. S. Rajagopala Aiyangar for respondent.

The Court delivered the following

JUDGMENT.—This is an application for review of taxation. The original application was by a notice of motion under S. 45

**In the matter of* The United India Life Assurance Co., Ltd. 23rd November, 1923.

In the matter of The United India Life Assurance Co. Ltd.

of the Specific Relief Act for directing the United India Life Assurance Company, Limited, to do certain things. The application is also entitled "In the matter of the United India Life Assurance Company, Limited" as required by the rules. But this is not an application under any of the sections of the Indian Companies Act. It is purely an application under section 45 of the Specific Relief Act. The learned Judge dismissed the application with "costs," but the order as drawn up is "taxed costs."

The contention raised by the applicant is that the order is wrongly drawn up, inasmuch as the learned Judge did not allow "taxed costs." The other contention is that, as the party did not appear by attorney but only by counsel, he is not entitled to bring in a bill for each item of work done and that all that the Court could do, even if the order as drawn up is right, is to award such costs as are allowable to an advocate appearing in a notice of motion. I think Rule 20 of Order 6 of the Fees Rules only refers to petitions or proceedings under the Indian Companies Act, Probate and Administration matters, petitions under the Guardian and Wards Act; Income-tax Cases, Habeas Corpus applications, claims to attached properties, application under the Trustees Act, Administrator-General's Act, arbitrations, and similar matters. I do not think that there is any provision under the rules by which an application under S. 45 of the Specific Relief Act will entitle an Advocate not appearing by Attorney to bring in an itemised bill as has been done in the present case charging for attendance and various other matters as if the Advocate himself was both attorney and advocate. The petitioner's Advocate states that he is willing that the bill may be taxed and does not want an amendment of the order, but his contention is that it should be taxed on the footing of a notice of motion conducted by an Advocate without an attorney and that he is prepared to pay whatever fees the taxing officer will allow on such taxation. I think his contention is right. If the matter does not fall under Order 6, Rule 20 it is clear that the bill such as is brought in by the Advocate for the counter-petitioner cannot stand.

I allow the application and direct the taxing officer to tax the bill on the footing that the order is for taxed costs on a notice of motion presented and conducted by an advocate without an attorney.

N.S. *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Sri Sri Sri Srinivasa Rajamani Raja Deo,
Rajah of Mandasa .. *Appellant* in both (Deft.)*

v.

Senapati Jagannaikulu and another .. *Respondents (Plffs.).*

Rajah of Mandasa v. Jagannaikulu.

Madras Estates Land Act (I of 1908), Ss. 51 to 53, 79 (2), 95 and 96—Settlement proceedings—Extract given to ryot by Settlement Officer under Rule 25 of the Rules under the Act - If amounts to a valid patta—Commutation of waram rate into money rate by the settlement—Duty of landholder to tender fresh patta containing altered terms—Distraint without tender of such patta—Validity—Holding owned and land cultivated by joint family, though holding registered in the name of a junior member—Wrongful distraint of crops on the land—Suit to set aside distraint by the manager of the joint family—Maintainability—Landholder's ignorance of cultivation by person other than registered holder, if material—"Cultivator"—Meaning of.

An extract given to a ryot by a Settlement Officer, under Rule 25 of the Rules framed under the Madras Estates Land Act, containing all the particulars of land and the tenant's liability, is not a patta complying with the requirements of section 51 of the Madras Estates Land Act.

A patta or muchilika cannot be said to continue in force under S. 53 of the Madras Estates Land Act if it does not contain the terms in force at the date of the distraint. Consequently, where the basis of payment of rent was charged by the settlement proceedings by the commutation of the waram rate which was prevailing before that time into a fixed money rate, it is the duty of the landholder to tender a fresh patta containing the altered terms and the landholder cannot avail himself of the special powers of distraint given to him under the Act unless he has tendered such a patta.

Where a holding was owned, and the land in the holding cultivated, by a joint family, although the registered holder of the holding was only a junior member of that family, the wrongful distraint of the crops or the produce of the land entitles the manager of the joint family to institute a suit to set aside the distraint under the provisions of the Madras Estates Land Act, irrespective of the fact whether the landholder had, or had not, notice of the cultivation by the person other than the registered holder.

Per *Kumaraswami Sastri, J.*—It is unnecessary that the cultivator should be a person who tills the soil; it does not matter whether he raises the produce directly or through servants. A joint family can be "cultivators" within section 96 of the Madras Estates Land Act.

Second Appeals against the decrees of the District Court of Ganjam in A.S. Nos. 208 and 207 of 1926 preferred

*S.A. Nos. 289 and 298 of 1927. 13th March, 1928.

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against the decrees of the Court of the Sub-Collector of Berhampore in O.S. Nos. 49 and 52 of 1926 respectively.

S. Varadachariar and *K. Bhashyam Aiyangar* for appellant

B. Jagannadha Doss for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS. *Kumaraswami Sastri, J. Second Appeal No.* 289 *of* 1927.—This appeal arises out of a suit under S. 95 of the Estates Land Act. The plaintiff is the tenant of the defendant who is the Rajah of Mandasa. The case of the plaintiff is that the defendant illegally distrained certain properties of his and the suit is to set aside the distraint. The plaintiff in paragraph 8 of the plaint states that the attachment made by the defendant is illegal, being contrary to the provisions of the Estates Land Act, and that there was no valid exchange of patta and muchilika or even a tender of a proper patta. To this the defendant replied in the written statement stating that the patta issued by the Settlement Officer continued in force, and that it is not correct to say that the attachment was illegal. It is not disputed that during fasli 1333 a record of rights under Chapter XI of the Estates Land Act was prepared and in 1333 rent was settled under that Chapter and before the record of rights was prepared the system in vogue was the sharing system and by the settlement proceedings certain cash rates were fixed. Up to fasli 1333 grain was paid and from 1334 cash rent was paid as per rate fixed by the settlement. The ryots appealed to the Board of Revenue and it did not grant the prayer of the ryots. The Board, however, acting under the powers given under Ch. XI reduced the rates of rent fixed by the Settlement Officer by an order, dated 17th December, 1925 by about three annas in the rupee. Under the Act, this determination of the rent takes effect from the next fasli. The defendant pleaded that there was sufficient compliance with the provisions of section 53, as under Rule 25 of the Rules framed under the Estates Land Act an extract has to be given to each ryot containing all the particulars of land and the tenant's liability. Section 53 runs as follows:

"No landholder shall have power to proceed against a ryot for the recovery of rent by distraint and sale of his moveable property or by sale of his holding under Chapter VI unless he shall have exchanged a patta and muchilika with such ryot or tendered him such a patta as he was bound to accept or unless a valid patta or muchilika continues in force."

Sections 50, 51 and 52 refer to exchange of pattas and muchilikas. Section 51 requires that a patta in addition to

giving certain particulars shall be signed by the landholder. It is clear from these provisions that an extract given under R. 25 of the Rules framed under the Act by the Settlement Officer would not be a patta complying with the requirements of S. 51. We think that the District Judge was right in holding that the plea that there was a valid tender of patta by reason of an extract being given would not avail the defendant, and on the pleadings there was no other question to be determined. It is argued that issue 2 which runs as follows, "was the attachment illegal in the absence of a muchilika," was the only issue that the Court had to try; and that under the other condition in section 53, namely, that there was a valid patta and muchilika in force, it is still open to the defendant to urge the validity of the distraint. I think that a patta and muchilika which is in force must be a patta and muchilika containing the terms in force at the date of the distraint. Under the settlement proceedings the basis of payment of rent is changed and what was before a waram rate was commuted into a fixed money rent. It cannot be said that the previous patta was not materially changed and that it would give the landholder the right to distrain. Distraint proceedings are of a summary nature, and the main object of the Act requiring exchange of patta and muchilika is that the tenant should know exactly what his rights are. Where there had been such a material change in the previous patta as was introduced by the settlement proceedings, I think it was the duty of the landholder to tender a fresh patta containing all the materials required under S. 51 and there is nothing in the Act to prevent him from doing so if he wants to take advantage of the special powers of distraint given to him. In my view pattas under section 53 should contain all the terms which are existing at the date of the distraint or else pattas would not be available for the purpose of distraint, when the basis of rent payable has been altered. I am of opinion that the decision of the District Judge is right and this appeal must be dismissed with costs.

Second Appeal No. 298 *of* 1927.—The next appeal No. 298 of 1927 raises the same question with the addition as to whether the plaintiff could sue, he, not being a registered tenant. In the plaint it is alleged that the plaintiff was the manager of an undivided family, and that lands were owned by the undivided family and that the properties were distrained from the house of the joint family. The written statement pleaded that the plaintiff was not the registered tenant and therefore

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he cannot sue, but later on, it is stated that because of the plaintiff's conduct, the landholder was compelled to distrain and to direct attachment of the plaintiff's properties with the help of the police. It appears that so far as the joint family is concerned, the registered tenant was a member of that family. There is little doubt that the family was cultivating the land and it is unnecessary that the cultivator should be a person who tills the soil; it does not matter whether he raises the produce directly or through servants. It cannot be said that the defendant was before attachment ignorant of the fact that the joint family was cultivating the land. In fact he says he was forced to distrain because of certain acts of the plaintiff. Mr. Varadachariar argues that having regard to the provisions of S. 95 read with section 79 (2), the only persons who could file a suit to set aside the distraint is the cultivator of whom the landholder had notice and to whom notice was to be given under the provisions of section 79 (2). In other cases the only remedy of the person whose property is distrained is to file a civil suit. There is nothing in the Act in so many words which says that no person could sue unless he is the registered tenant. Mr. Varadachariar wants us to infer this from these two provisions. Section 77 empowers a landholder to distrain the moveable property of the defaulting ryot or the growing crops or the produce of the land or the trees in the defaulter's holding. This entitles distraint not only of the defaulting ryot's properties but also the properties of the cultivating tenant. Unless there is something compelling us to hold otherwise, it seems to me difficult to hold that the right of a person who, if he was a cultivator and whose property is wrongfully distrained, is to have the benefit of the summary proceedings under this Act, should be controlled by the knowledge of the landholder and that if the landholder pleads ignorance the person whose property has been distrained should seek his remedy by filing a civil suit for damages. The wording of the section is not very happy. But I do not think that the mere fact that section 95 casts on the landholder the duty of giving notice to the cultivator, by necessary implication, takes away the right of suit from the cultivator even though it is shown that it was the cultivator whose property had been wrongfully taken away. I think the remedy given by section 95 ordinarily would be the remedy given to a person whose property has been wrongfully distrained. So long as it is shown that he was cultivating and that his property had been distrained,

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I do not think that the word "aforesaid" in section 96 should be so construed as to deprive the right of suit. I think that the introduction of the word in section 79 casts the duty on the landlord to give notice to the cultivator and nothing more is warranted by section 79. Reference is made to *The Midnapore Zemindary Co., Ltd.* v. *Muthappudayan*,[1] which was a case under S. 112 of the Act where we do not find the word "cultivator," and the only question there was about the registered holder. That decision does not render much help. I do not think that where the cultivator's property has been distrained wrongfully, he is deprived of the right of suit under the Act or of the right to plead that the distraint is not warranted by the provisions of the Act simply because he happens to be not the registered holder or the landholder chooses to say that he had no notice of his cultivation. The matter is not free from difficulty, but it could not have been the intention of the legislature to deprive a person referred to above of his remedies under the Act. This appeal also fails and is dismissed with costs.

Reilly, J.

Reilly, J.—In the suit out of which Second Appeal No. 289 of 1927 arises the plaintiff objected to the defendant's distraint as illegal on the ground that there had been no valid exchange of patta and muchilika between the parties and no proper patta had been tendered to him by the defendant. To this the defendant replied that the patta issued by the Settlement Officer at the recent monetary settlement continued in force and therefore the distraint was not illegal. The Sub-Collector who heard the suit framed an issue on these pleadings in the following terms: "Was the attachment illegal in the absence of a muchilika." His finding was that it was not illegal and that the distraint was valid, because the settlement patta issued by the Revenue Department after settlement was one which the plaintiff was bound to accept and he presumed that the plaintiff had accepted it. The finding therefore was that there had been a proper tender of patta. When the case came before the District Judge, he found that there was no exchange of patta and muchilika and decreed the suit on that ground. Mr. Varadachariar has objected in this appeal that the District Judge should not have allowed a new point to be taken before the Appellate Court in that way for the first time. On the pleadings it does not appear to be a new point. Mr. Varadachariar objects that, if his client had had no opportunity, he could have shown that there had

1. (1920) I.L.R. 44 M 534: 40 M.L.J. 213.

Rajah of Mandasa v. Jagannaikulu.

Reilly, J.

been a proper exchange of waram pattas and muchilikas between the parties which would have made the defendant's right to distrain clear under section 53 of the Act. Section 53 provides that the landholder shall not have power to distrain for rent unless he shall have exchanged a patta and muchilika with the ryot or tendered to the ryot such a patta as he was bound to accept or unless a valid patta or muchilika continues in force. Under the waram system the amount to be collected year after year is fixed for that year on the basis of the crop; but under the monetary settlement the money rent is fixed for a period of thirty years unless special proceedings are taken. It cannot be said that the waram patta was any longer in force after the money settlement. Nor can it be said within the meaning of section 53 that the defendant had tendered to the plaintiff any patta which he was bound to accept in the fasli or in relation to the fasli in question. If there had been an exchange of waram patta and muchilika, that could not be sufficient compliance with section 53 of the Act to give the landholder a right to distrain after the money settlement had come into force. The right to distrain is a special right, and the intention of section 53 of the Act appears to me to be to confine that right to two sets of cases, that is, cases where there has been an exchange of pattas and muchilikas or tender of proper pattas and cases where valid pattas or muchilikas continue in force, the terms of which are clear and unquestionable between the parties. In the present case I do not think that the learned District Judge was wrong in allowing the question to be argued before him in first appeal. I agree, therefore, that Second Appeal No. 289 of 1927 must be dismissed with costs.

Second Appeal No. 298 of 1927 raises exactly the same points with the addition that the plaintiff is not the registered ryot. In his plaint he described himself as the manager of the joint family which owned the holding in question. In reply the defendant denied that the plaintiff was the registered pattadar. He said further on in his written statement that he had a right to distrain the plaintiff's property. The landholder has a right to distrain the moveable property of the defaulting ryot or the growing crops on the land or the produce of the land. The effect of that is that he can distrain not only the property of the ryot himself but the crops which may have been raised by the ryot's tenant or the produce which has been removed by the ryot's tenant. If the plaintiff is not the registered ryot of this land—and it is admitted he is not and that a junior member

of the family is the registered ryot—then the only way in which the defendant-Zamindar could have a right to distrain the plaintiff's property for the rent concerned would be on the ground that it was the crop or the produce of the registered ryot's land. It has been explained to us that, although the registered holder is a junior member of the family, the holding is owned and the land is cultivated by the plaintiff's joint family. Under S. 96 certain cultivators of land, for the rent of which the property is distrained, can bring suits in the Revenue Courts. Mr. Varadachariar contends that the word "cultivator" in section 96 of the Act must be read with sections 95 and 79 (2) of the Act, with the result, as he interprets those provisions, that it is not every cultivator other than a pattadar who can bring a suit in respect of the property distrained, but only a cultivator of whose cultivation the Zamindar has notice. If the provisions of the Act are to be construed in that way, the result will be very extraordinary. The landholder might cut the crop which the cultivating tenant had raised on the defaulting ryot's holding, and, if it happened that the landholder had notice of the person who raised the crop, the cultivating ryot would have a summary remedy by way of suit in the Revenue Court, but if the Zamindar were ignorant who was the cultivating tenant, the cultivating tenant would be equally damnified but would be deprived of that remedy. That would be an extraordinary result. I do not think that there is anything in the wording of the Act which warrants such an interpretation. The term "cultivator aforesaid" in section 96 of the Act appears to me to be a cultivator other than the defaulter as mentioned in section 79 (2) of the Act. That being so, I agree that the plaintiff in this suit had a right to sue and that this Second Appeal also must be dismissed with costs.

N.S. *Second Appeals dismissed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Straits Settlements (Settlement of Singapore).]

PRESENT:—VISCOUNT HALDANE, LORD ATKINSON, LORD BLANESBURGH, LORD DARLING AND LORD WARRINGTON OF CLYFFE.

Lim Yam Hong, trading as Lee Hong & Co. .. *Appellants** (*Defts.*)

v.

Lam Choon & Co. .. *Respondents* (*Plffs.*).

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Lim Yam Hong v. Lam Choon & Co.

Evidence—Admission of inadmissible—Objection to—Failure of counsel to raise—Effect—Trial Judge—Finding of—Fact of, based on oral evidence—Weight due to.

The fault of an advocate in not objecting to the admission of merely hearsay evidence cannot so alter its character as to convert it into corroborative evidence.

According to well-established rules great regard is to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him.

Appeal No. 28 of 1927 from the Supreme Court of the Straits Settlements.

The material facts are given in their Lordship's judgment.

18th July, 1927. The judgment of their Lordships was delivered by

Lord Darling.

LORD DARLING.—This case was tried by Sir James Murison, Chief Justice, and the nature of the matter in dispute is sufficiently stated by him in these words:—

"The plaintiffs in this case sue the defendants for $10,164 for breach of contract to take delivery of fifteen tons of Singapore Standard Flat Bark Crepe at $1.03¼ per pound. The defendant denies that he ever made such a contract The damages represent the difference in price when the rubber in question was sold in the open market after defendant's repudiation of the agreement.

The only issue is whether defendant made the agreement or not.

The plaintiff says that the agreement was made on his behalf by Cheng Kee, clerk of Messrs. Green & Collier, Brokers, with the defendant on the 4th August, 1925.

The burden of proof lies upon the plaintiff His witnesses are Cheng Kee, clerk to Messrs. Green & Collier, and Mr. Green"

The Chief Justice was not satisfied that the plaintiffs had proved the making of the alleged contract, and he therefore entered judgment for defendant. On appeal to the Supreme

*P.C Appeal No. 28 of 1927. 18th July, 1927.

Court of the Straits Settlements, this judgment was set aside and judgment entered for the plaintiffs for the amount claimed, Mr. Justice Reay dissenting from the opinion expressed by Mr. Justice Brown and Mr. Justice Deane, the other members of that Court.

The evidence given by Mr. Green for the plaintiffs, although accepted entirely by the learned Chief Justice, was rightly declared by him to be of itself quite insufficient to prove the making of the contract. For that purpose, therefore, reliance was placed on the testimony of Cheng Kee, a clerk or broker employed by the plaintiffs. This man the learned Chief Justice qualified as "not a very bad witness," and added that if he could get definite corroboration of his story the denials of the defendant and his witnesses would not have availed to displace the evidence called on behalf of the plaintiffs. "But," said the Chief Justice, "I find very great difficulty about the corroboration of Cheng Kee's evidence." He, therefore, held that the burden of proof was not discharged; and so he pronounced in favour of the defendant.

The corroboration of Cheng Kee mainly relied upon by plaintiffs' counsel was the established fact that a confirmation slip of the contract was prepared in the plaintiffs' office, and, further, that Cheng Kee swore that he himself on 4th August gave this note into the defendant's own hand. This statement was denied by the defendant, who swore that he did not see Cheng Kee on that day.

It was stated by Mr. Green that on 11th August he, with Cheng Kee, went to the defendant's office and there saw his manager, Ah Choon, "who said he had seen Cheng Kee hand our confirmation slip to the defendant." It was not alleged that the defendant was then present, and it is clear that, he being absent, this conversation was not evidence against him. Further, Cheng Kee, in his evidence, was allowed to say: "On the 11th August the defendant's manager (Ah Choon) told the plaintiffs' towkay and Green, that he had seen the confirmation slip." This also is not evidence against the defendant, and regarding it Ah Choon swore "Cheng Kee did not call on the 4th August. I did not see him. I never said I had seen the confirmation slip—Cheng Kee said that."

Now all this evidence was relied on by the two learned Judges, who allowed the appeal, and especially by Mr. Justice Deane, as being sufficient corroboration of Cheng Kee's testi-

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mony to justify the reversal of the judgment of the Chief Justice.

It is true that the evidence of what Ah Choon, who was not alleged to have any authority to represent the defendant, had said in his absence was not objected to by the defendant's counsel, but still the fault of an advocate cannot so alter the character of testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay. Yet this was also accepted as good evidence of the contents of a written document; since the paper, said to have been delivered to Ah Choon, was treated as a note confirming a contract. Moreover, it was impossible to treat statements by Cheng Kee as corroborating his own evidence, for these were merely parts of that very evidence itself.

To their Lordships it appears that the two learned Judges of the Supreme Court, who came to a conclusion opposed to that of the Chief Justice who had tried the case, did so upon grounds which cannot support their conclusion.

Their Lordships agree with Mr. Justice Reay—who dissented from the opinions expressed by his colleagues in the Supreme Court—that the Chief Justice's decision was attacked on the ground that he "overlooked, or did not attach sufficient weight to this (Ah Choon's) admission. It is a sufficient and it is obviously a fair answer to this attack that the admission was irrelevant, and that the evidence regarding it should not have been admitted. If it was disregarded, it was rightly disregarded."

Applying the well-established rules as to the amount of regard to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him, and having considered all the evidence admitted, their Lordships are of opinion that the judgment of Chief Justice Murison should stand, and they will therefore humbly advise His Majesty that this appeal should be allowed with costs, the judgment of the Court of Appeal set aside, and the judgment of the Chief Justice restored with costs in both Courts.

Solicitors for appellants: *Parker, Garrett & Co.*

Solicitors for respondents: *Peacock & Goddard.*

K.J.R. *Appeal allowed.*

[*Reporter's Note—See* also *Miller* v. *Madho Das* [(1896) I.L.R. 19 All 76] where there was an erroneous omission to object before the Courts below to the admission of evidence that was not relevant, and their Lordships

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of the Privy Council held that that was not enough to make irrelevant evidence relevant. This pronouncement of the Privy Council has led to some conflict of judicial opinion in India; see (*inter alia*) *Girindra Chandra Ganguli* v. *Rajendra Nath Chatterjee* [(1897) 1 C.W.N. 530], *Hriday Krishna Das* v. *Prasanna Kumari Chowdhurani* [(1900) I.L.R. 28 C. 142], *Tara Prasonno Mukherjee* v. *Asutosh Chowdhury* [(1909) 2 I.C. 998], *Basir Gazi* v. *Grija Nath Roy* [(1910) 9 I.C. 211] and *Luchiram Motilal Boid* v. *Radha Charan Poddar* [(1921) I.L.R. 49 C. 93]. Their Lordships' present judgment, although on appeal from the Straits Settlements, will be a useful guide to the Courts in this country, as it reiterates the principle laid down by the Board as far back as 1896 in *Miller's case.*—K.J.R.]

PRIVY COUNCIL.

[On appeal from the Court of Appeal of New Zealand.]

PRESENT:—LORD CHANCELLOR, LORD BUCKMASTER, LORD CARSON, LORD DARLING AND LORD WARRINGTON OF CLYFFE.

John Lachlan McGillivray Watson .. *Appellant**

v.

Bertha Elinor Lilian Haggitt and others .. *Respondents.*

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Indian Contract Act, 1872, *S.* 256—*Partnership for term—Continuance of, after expiry of term—Relationship between parties in case of—Death of a partner—Business carried on by other partner after—Rights and duties of parties in case of—"Net annual profits" to be paid under partnership agreement to representatives of deceased partner in case of—Meaning of—Salary allowed to surviving partner during life-time of deceased—Deduction of, in calculating such profits—Survivor's right to—Deed—Construction—Expression same used in different places in deed—Same meaning to be attached to—Rule as to—Nature of and limits to.*

Where a partnership is entered into for a fixed term, and the term expires but the partners continue the business as partners at will without fresh articles, the business is deemed to be continued upon the old terms so far as they are applicable to a partnership at will.

Where under partnership articles it was provided that in the event of a partner dying or becoming insane, etc., during the term of the partnership, the surviving or remaining partner would pay to the representatives of the partner so dying, etc., a share of the "net annual profits" of the partnership business, the Judicial Committee held that the net annual profits, by which the amount of the sum to be paid by the surviving partner was to be measured, would be ascertained by deducting from the receipts and earnings of the business such outgoings and ordinary business expenses as were under the partnership articles or by the practice of the partners so deducted during the partnership, the business being for this purpose treated as a continuation of the partnership business. A payment, however, which under the partnership articles ceased with the dissolution of the partnership could not be properly deducted.

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*P.C. Appeal No. 100 of 1927. 17th November, 1927.

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Where a partnership is dissolved by death of a partner, the business if carried on by the surviving partner is so carried on by him on his own sole account and for his own benefit, the annual sum payable (under the partnership articles) to his deceased partner's executors being, in substance, purchase money for his interest in the assets of the business.

Upon the construction of the partnership articles in the case, *held*, that, without an express provision to that effect, the surviving partner was not entitled, in calculating the amount of "net annual profits" payable to the representatives of the deceased partner, to a deduction of the salary allowed by the agreement to the surviving partner during the life-time of the deaceased.

In construing the provisions of an agreement, there is no *rigid* rule that the same meaning ought to be given to an expression in every part of the document in which it appears "The truth is that there is no rule of such general application as is contended for. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary or permissible so to do."

Appeal No. 100 of 1927 from the Court of Appeal of New Zealand, dated 13th December, 1926.

The material facts are given in their Lordships' judgment.

Maugham, K.C. and *Stamp* for appellant.

G. B. Hurst and *Brasch* for respondents were not called upon.

17th November, 1927. Their Lordships' judgment was delivered by

Lord Warrington of Clyffe.

LORD WARRINGTON OF CLYFFE.—This appeal raises a question of construction upon articles of partnership between the appellant John Lachlan McGillivray Watson and Arthur Bryan Haggitt. The business of the partnership was that of barristers and solicitors.

The articles were dated the 18th May, 1905, and the term of the partnership was 15 years from that date. The term expired on the 18th May, 1920, but the partners continued the business as partners at will without fresh articles, and, therefore, upon the old terms so far as they were applicable to a partnership at will.

Mr. Haggitt died on the 5th January, 1926, and the partnership was thereby dissolved. The respondents are his executors.

The articles contained the following clause (No. 21):—

"If at any time during the term of the said partnership either of the said partners shall die or become permanently incapacitated for work or shall become insane or of unsound mind to such an extent as to render him unable or unfit to carry on the business of the partnership then and in any such case the surviving or remaining partner shall during the period of five years from the occurrence or happening of such event or contingency pay to the executors and administrators of such partner so

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dying as aforesaid or as the case may be to the committee or representatives of such partner so incapacitated as aforesaid a sum equivalent to a one-third part or share of the nett annual profits of the said partnership business for each year of the said term of five years."

Taken by itself that clause presents no difficulty of construction. The nett annual profits, by which the amount of the sum to be paid by the surviving partner in each of the five years is to be measured, would be ascertained by deducting from the receipts and earnings of the business such outgoings and expenes as were under the articles or by the use and want of the partners so deducted during the partnership, the business being for this purpose treated as a continuation of the partnership business (*Ex parte Harper*[1]). A payment, however, which under the articles ceased with the dissolution of the partnership would not be properly deducted.

The appellant, however, contends—and his contention was upheld by the Judge of first instance and by one of the four Judges in the Court of Appeal—that he is entitled to deduct, in addition to the ordinary business expenses and outgoings, an annual sum payable to him by way of "salary" during the partnership. Whether this contention is correct is the question for decision.

The clause of the articles providing for payment of "salaries" to the partners is clause (3), which is in the following terms:—

"The said Arthur Bryan Haggitt shall receive a salary of £600 for the first year of the said partnership term, a salary of £750 for the second year of the said partnership term and the said John Lachlan McGillivray Watson shall draw all the nett profits of the said business during the first two years aforesaid. During each of the third, fourth and fifth years of the said partnership term the said J. L. M. Watson shall draw a salary of £1,500 per annum and also one-half of the nett profits for each such year and the said A. B. Haggitt shall draw a salary of £750 per annum for each of the said third, fourth and fifth years and also one-half of the nett profits for each such year. Thereafter and during the continuance of the said partnership term the said J. L. M. Watson shall draw a salary of £1,500 per annum and one-half of the nett profits each year and the said A. B. Haggitt a salary of £1,000 per annum and one-half of the nett profits for each year during the term of the said partnership, and the said partners shall be allowed to draw the aforesaid amounts by monthly instalments in anticipation of their respective shares or profits in the said partnership business."

Clause 5 is a common form of provision for the payment of expenses, outgoings and losses out of the receipts and earnings of the business.

1. (1857) 1 De G. & J. 180.

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"And in case of deficiency thereof then by the said partners in the shares in which they shall for the time being be entitled to the nett profits of the said business."

The contention of the appellant and the judgments of the two Judges who decided in his favour are based upon a supposed rule of construction that the same meaning ought to be given to an expression in every part of the document in which it appears.

Applying this supposed rule it is said that "nett profits" in clause 3 and in clause 5 means what is left after the deduction of salaries, and, therefore, it must have the same meaning in clause 21. If this conclusion were logically applied the "salary" of A. B. Haggitt should also be deducted and paid to his executors, but the absurdity of paying a "salary" to the executors of a dead partner who cannot give any assistance in the business is recognised and the Judges who were in the appellant's favour stop short of the logical application of their conclusion by deciding that the "salary" of the appellant alone ought to be deducted.

The truth is there is no rule of such general application as is contended for by the appellant. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary or permissible so to do.

In the opinion of their Lordships it is in the present case quite clear that in clause 21 the expression "nett profits" has a different application to that which it has in clause 3 and clause 5. Clause 21 is dealing with a state of things wholly different from that dealt with in clause 3. The partnership is dissolved, the "salaries" which were payable "during the continuance of the partnership term" have ceased and the business is being carried on by the appellant on his own sole account and for his own benefit, the annual sum payable to his deceased partner's executors being, in substance, purchase money for his interest in the assets of the business. Under such circumstances it is impossible to hold, without an express provision to that effect, that the partners intended to allow a salary to the surviving partner.

Their Lordships are of opinion that the appeal fails and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *C. J. Wray.*

Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

K.J.R. *Appeal dismissed.*

[*Reporter's Notes.*—(1) as regards the surviving partner's claim for a "salary," reference may usefully be made to the judgment of the

Privy Council in *Hedayetulla* v. *Mahomed Kamil* [(1924) 81 I.C. 525 (P.C.)] (on appeal from I.L.R. 48 Cal. 906), where their Lordships allowed fair remuneration to the surviving partner for the management of the business.

(2) This was a case from *New Zealand*, where a partnership between barristers and solicitors is apparently not forbidden. Generally speaking, such partnerships are not recognized. "Any dealings between members of the Bar and solicitors as regards sharing costs or profits are incompatible with the discipline of the Bar": (Consolidated Regulations of the Four Inns of Court (January, 1907), S. 15); Halsbury's Laws of England, Vol. II, p. 370.—K.J.R.]

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*In Insolvency.*]

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI (In Chambers.)

In the matter of K. Audisesha Naidu, an Insolvent.

The Nedungadi Bank, Ltd., Madras .. *Applicants**

v.

The Official Assignee of Madras .. *Respondent.*

The Nedungadi Bank, Ltd., Madras *v.* The Official Assignee of Madras.

In re, Audisesha Naidu.

Presidency Towns Insolvency Act, S. 52—Order and disposition clause in—Applicability to property in possession of Receiver appointed by Court—Receiver's possession—Legality of—Right of third parties to attach—Order appointing Receiver not challenged—Effect.

The appointment of a Receiver removes the property from the possession of the insolvent and the order and disposition clause in section 52 of the Presidency Towns Insolvency Act does not apply to property of the insolvent in the possession of the Receiver so appointed.

When an order has been made by a Court appointing a Receiver and the Receiver takes possession, it is not open to third parties to question the legality of the possession of the Receiver so long as the order appointing the Receiver is in force

T. L. Venkatarama Aiyar and *T. R. Venkatarama Aiyar* for applicants.

V. Varadaraja Mudaliar for respondent.

The Court delivered the following

JUDGMENT.—This is an application by the Nedungadi Bank, Ltd., for an order directing the Official Assignee to deliver possession of five motor cars specified in the application and to pay Rs. 44 which is alleged to be the amount realised by the sale of one motor car which was sold by the Official Assignee.

The affidavit in support of the application sets out that the insolvent Audisesha Naidu was the proprietor of the City Taxi

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*Petition No. 264 of 1928. 21st November, 1928.
Application No. 723 of 1928.

The Nedungadi Bank Ltd., Madras v. The Official Assignee of Madras. In re, Audisesha Naidu.

Company, that he obtained an overdraft from the bank on the terms set out in a deed, dated the 1st of June, 1926, by which it was *inter alia* provided that the bank should allow accommodation to the insolvent to the extent of Rs. 5,000 on the security of six motor cars described in the schedule to the registered deed, that the bank became the mortgagee of the six cars to the extent of the advances made, that the deed also provides that the bank would be entitled to take possession of the cars whenever desired by it, that one Sambamurthi claiming to be a creditor of the insolvent filed C.S. No. 69 of 1928 on the file of this Court for the enforcement of his claim in that suit and Mr. K. G. Ramaswami Aiyangar, Advocate, was appointed receiver of the properties belonging to the insolvent and the receiver took possession of the cars which had been mortgaged to the bank, that the bank on being informed of it wrote to the receiver on the 22nd of June, 1928, demanding Rs. 2,225-3-11 due to the bank and asking that it should be paid on or before the 1st of July, 1928 and stating that in default possession would be taken, that the receiver applied for further time on the 26th of June, 1928, which was refused by the bank, that subsequently Audisesha Naidu was adjudicated insolvent on the 10th of July, 1928, that the Official Assignee has taken possession of the cars from the receiver, that the bank called on the Official Assignee to give possession of the cars, that one of the cars was sold by the Official Assignee for Rs. 44 and that the other cars are still with the Official Assignee.

The Official Assignee states that he is not aware of the claim of the bank, that the insolvent carried on the business of hiring motor cars in this City under the name of the City Taxi Company and for the purpose of that business he purchased and registered cars in his own name and the cars remained in his possession till the date of his adjudication, that under the deed of mortgage, dated the 1st of June, 1926, the cars were allowed to remain in the posession, order and disposition of the insolvent with the consent of the bank, the insolvent being the reputed owner thereof, that the receiver was appointed with a view to run the business under the guidance of the insolvent and pay certain creditors specified in the order including the bank, that the appointment of the receiver has not the effect of changing the ownership of the insolvent over the cars, that the acts of insolvency mentioned in the petition began from April, 1928, and the adjudication of the 10th of July relates back to April, that the insolvent was the reputed owner of the

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cars and that the bank has no claim. He says he did not take possession of one car No. 6110.

The deed of mortgage, dated the 1st of June, 1926, has been marked as Ex. A. It provides that the bank shall have a first charge on the motor cars and that the bank may at any time require possession to be delivered to it. It also empowers the bank to take possession of all the cars in case the amount due is not paid when demanded. It also provides that if the mortgagor commits any breach of the agreement or if he commits any acts of insolvency or assigns his estate for the benefit of his creditors, the bank is entitled to enter on the premises and take possession of the cars.

It is not disputed that the cars were left in the possession of the insolvent nor is it disputed that on the 12th of April, 1928, a receiver was appointed to manage and run the business. The receiver's application was opposed but ultimately the receiver was appointed. The receiver was to be in charge of, manage and run the business of the City Taxi Company; he was to be guided by the advice of the defendant in the running of the business and he was directed to make payments from the net earnings of the business to the creditors named in the counter-affidavit. It was also ordered that all the stock and goodwill of the company shall vest in the receiver.

This order (Ex. B) was passed on the 12th of April, 1928. The receiver wrote to the bank Ex. C on the 5th of May, 1928, intimating that he has taken possession. The bank wrote Ex. D on the 7th of May asking for a copy of the order of Court appointing a receiver. On the 8th of June the receiver wrote Ex. E enclosing a copy of the order. On the 22nd of June the bank wrote Ex. F to the receiver sending him a copy of the mortgage deed (Ex. A) and asking for payment by the 1st of July. On the 26th of June the receiver wrote Ex. G stating that the financial position of the company prevents him from making payment as desired by the bank, that he was running the business under the order of Court, that he had been directed to pay certain creditors including the bank and requesting the bank to wait for some time and stating that he would pay the amount in easy instalments from the collections On the 28th of June the bank wrote Ex. H stating that it could not wait any longer unless it knew something definite about the date of closing the loan. On the 3rd of July the receiver wrote Ex. J stating that he hoped to pay something from the collections every

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month and that the bank cannot take possession because the goods have vested in him as receiver.

On the 26th of June the petition for adjudication was filed. On the 10th of July the debtor was adjudicated. On the 30th of July notice went to the bank informing it of the adjudication.

It is contended for the bank that by reason of the vesting of the property in the receiver, the order and disposition clause in section 52 of the Act does not apply as the property was in *custodia legis,* that the bank had prior to the insolvency petition given notice that it would take possession and that any subsequent possession by the receiver being wrongful, the property was not with the consent of the bank in the possession of the defendant even assuming that the receiver's possession was the possession of the defendant.

I am of opinion that section 52 does not apply as the property was not in the possession, order and disposition of the debtor either at the date of the presentation of the petition or at the date of adjudication. There is no evidence of any acts of insolvency committed before the petition so as to make the adjudication relate back.

I am of opinion that the appointment of receiver removes the property from the possession of the insolvent. In *Taylor* v. *Eckersley*[1] it was held that the order and disposition clause does not apply when the property is taken possession of by the receiver appointed by Court. In *Fletcher* v. *Manning*[2] it was held that goods mortgaged before insolvency and which were at the time of bankruptcy in the hands of the Sheriff under an execution against the bankrupt were not under the order and disposition of the insolvent.

It has been argued by the respondent that as the receiver appointed did not give notice to all the creditors the property must be deemed to have remained in the order and disposition of the insolvent and reference has been made to *Rutter* v. *Everett*[3] and *In re Neal: Ex parte The Trustee.*[4] In the present case the property is tangible moveable property and unlike debts notice to the debtor is unnecessary to complete the title of the transferee.

It has also been argued that the Court had no jurisdiction to appoint a receiver in C.S. No. 69 of 1928 which was a simple claim for money and reference has been made to *Chockalingam*

1. (1877) L.R. 5 Ch. Dn. 740.
2. (1844) 12 M & W 571.
3. (1895) L.R. 2 Ch. 872.
4. (1914) L.R. 2 K.B. 910.

The Nedungadi Bank, Ltd., Madras v. The Official Assignee of Madras.

In re, Audisesha Naidu.

Pillai v. *Pichappa Chettiar.*[5] I have in *Ethirajulu Chetty* v. *Rajagopalachari*[6] dealt with all the authorities on the subject and come to the conclusion that under O. 40, R. 1 of the Code of Civil Procedure the Court has power to appoint a receiver even in case of simple mortgages. I am also of opinion that when an order has been made by a Court and the receiver takes possession, it is not open to third parties to question the legality of the possession of the receiver so long as the order appointing a receiver is in force.

It is argued for the bank that the notices sent by the bank to the receiver demanding possession put an end to the right of the mortgagor to remain in possession and that where notice is given of the determination to take possession conferred by the deed of mortgage it is sufficient to take the property out of the order and disposition of the insolvent. In view of my decision on the first construction as to the effect of the appointment of a receiver I think it unnecessary to decide this question.

I allow the application except car No. 6118 of which the Official Assignee did not take possession with taxed costs payable out of the estate. The assignee will take the taxed costs of the application out of the estate.

A.S.V. ——— *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE PAKENHAM WALSH.

Sultan Kani Rowthan .. *Appellant* (Deft.)*

v.

Mahomed Meera Rowthan and others .. *Respondents (Plff. & Deft.).*

Sultan Kani Rowthan v. Mahomed Meera Rowthan.

Transfer of Property Act, S 55 (6) (b)—Purchaser's lien under—Extinguishment of—Conditions—Purchaser declining to take only portion of property contracted for on payment of full price as provided by S. 15 of Specific Relief Act—Effect of, on his lien under S 55, (6) (b)—S 15 of Specific Relief Act—Scope and effect of—Damages for breach of contract awarded to purchaser—Lien under S 55 (6) (b) if extends to

Section 15 of the Specific Relief Act is enacted for the benefit of the purchaser and cannot operate to his detriment. The section gives him an option to take only a fraction of the property contracted for on payment of the full price stipulated for, and if he declines to do so he cannot be said to be acting improperly within the meaning of S 55 (6) (b) of the Transfer of Property Act and cannot be deprived of the statutory charge given by that sub-section

* S.A. No. 1265 of 1925. 26th October, 1923.

5. (1925) 22 L.W. 579. 6 Reported at p. 115 of this volume.

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The purchaser's lien under section 55 (6) (*b*) of the Transfer of Property Act is not extinguished although he rejects or puts an end to the contract, provided the failure of performance is attributable to the vendor It is operative when the contract goes off without any default on the part of the purchaser.

The purchaser's lien under S. 55 (6) (*b*) does not extend to the amount awarded to him as damages for breach of the contract

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Ramnad at Madura in A. S No. 33 of 1923 preferred against the decree of the Court of the District Munsif of Paramakudi in O.S. No. 754 of 1920.

R. Kesava Aiyangar for appellant.

M. Patanjali Sastri for respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—This appeal raises a question of some importance regarding the purchasers' lien under S. 55 (6) (*b*) of the Transfer of Property Act. The plaintiff agreed to purchase certain immoveable properties from the first three defendants. At that time, the properties belonged jointly to six persons, namely, defendants 1 to 6. The price settled was Rs. 500 and a part payment of Rs. 200 was made. The three persons who were parties to the agreement (defendants 1 to 3) undertook to get a conveyance executed by themselves as well as the other three part owners. A sum of Rs. 200 was provided as liquidated damages in the event of default on either side. It was further stipulated that the agreement was to be carried out within five months from its date (Ex. A, dated 9th April, 1920). The promisors did not carry out their part and on the 6th September, 1920, the plaintiff sent a notice (Ex. I) to one of the executants in which it was stated:

"If you fail at the sight of this notice to execute the sale-deed jointly with the persons mentioned in the agreement, I hereby inform you that a suit will be filed for the recovery of Rs 400 due to me (Rs. 200 part of price, *plus* Rs. 200 damages)."

In spite of this notice, defendants 4 to 6 conveyed their interest in the property on the 10th September for Rs. 400 to the 7th defendant (Ex. IV) and a week later, that is on the 17th September, the first three defendants similarly conveyed their share to the same persons for Rs. 200 (Ex. III). The plaintiff then brought his present suit for specific performance impleading the 7th defendant on the ground that he was purchaser with notice.

Section 15 of the Specific Relief Act enacts that, in a case like the present, the vendor cannot claim specific performance,

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but the purchaser may claim it, at his option under a certain named condition: the section says that if the buyer is willing to pay the full price but takes only a fraction of the property, waiving all right to compensation or loss, in that case, he is entitled to specific performance. Now what happened at the trial is this: the 7th defendant offered to give up the interest which he purchased from defendants 1 to 3, provided the plaintiff paid the full price, namely, Rs. 500; and, as might be expected, this offer was declined. The Lower Court thereupon passed a decree for Rs. 400 against defendants 1 to 3 personally, and it also passed a decree against the 7th defendant making that sum, a charge over the share of the vendors in the property he purchased. The Lower Court recorded a finding that the 7th defendant is a purchaser with notice and in second appeal that finding cannot be disturbed.

The question that arises in this case is, is the plaintiff entitled to a charge under S. 55 (6) (*b*) of the Transfer of Property Act. It runs thus:

"The buyer is entitled, unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount."

Can it be said, in the circumstances, that the plaintiff "has improperly declined to accept delivery of the property." In other words, is he guilty of improper conduct in refusing to pay the full price for six-elevenths of the property? S. 15 of the Specific Relief Act is enacted for the benefit of the purchaser and cannot operate to his detriment. That section gives him an option and if he declines to accept an offer which brings him loss, he cannot be regarded as acting improperly. If his conduct is not improper, he cannot be deprived of the statutory charge.

Two very useful cases have been cited to us by the learned Advocate for the respondent. The first of them is *Rose v. Watson.*[1] In that case certain persons agreed to purchase a portion only of a big plot from one William Potter on a representation made by him that the entire big plot would be laid out, and a church would be built contiguous to the part purchased. The representations were not carried into effect and Potter mortgaged the whole of the estate to a certain company, who took

1. (1864) 10 H.L.C. 672.

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the mortgages with full notice of the facts. The purchasers treating the agreement as void claimed a lien on the estate. The question arose, were they entitled to that lien? The contention that was put forward on behalf of the mortgagees was that the lien was extinguished as the contract was rejected by the purchaser. Lord Westbury in his judgment observes at page 679:

"It cannot be contested in this case that although the contract has failed of being performed completely, that failure of performance is attributable entirely to the vendor . . But, my Lords, it has been contended at the Bar in words, that the contract has been rejected by the purchaser, and that, therefore, the purchaser ought not to have the benefit of lien. . . . . It is quite a mistake and a misapplication of the words to say that the purchaser has rejected the contract or put an end to the contract. The purchaser would have been willing to perform the contract if the vendor had performed those things which in good faith he was bound to do. And it is impossible to say with any truth or accuracy of expression that the purchaser had repudiated the contract, because the vendor has failed to redeem his own promises to which he had pledged his faith, and in dependence upon which the purchaser entered into the contract."

This case is an authority for the proposition that the purchaser's lien is not extinguished although he rejects or puts an end to the contract, provided the failure of performance is attributable to the vendor. The second case to which we have been referred to is *Whitbread & Co., Ltd.* v. *Watt.*[2] This case goes even further. The agreement was to the effect, that the purchase was to be completed as soon as 300 houses were erected on the estate: If these houses were not erected within two years, the purchaser was to have the right to rescind the agreement. Under this power reserved to him, the purchaser cancelled the contract. The houses were not built contrary to expectation, but there was no default or misconduct on the part of the vendor. The question is stated somewhat thus in the judgment of Vaughan Williams, L. J., at page 839:

"Suppose a person contracts to sell a property and the purchaser pays a deposit and owing to some fact, not being misconduct on either side, the contract goes off, has the purchaser a lien on the estate for his deposit?"

It was held that the purchaser would equally have a lien although there was no default on the part of the vendor. As was observed, in the case "it is not default, it is rather misfortune."

2. (1902) 1 Ch. 835.

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Cozens-Hardy, L. J., observes at page 841:

"In other words, when the contract goes off either by reason of the default of the vendor or without any default on the part of the purchaser the lien becomes operative."

Applying the test laid down in these cases, the plaintiff cannot be said to have "improperly declined to accept delivery of the property" within the meaning of section 55 of the Transfer of Property Act. The 7th defendant is a person claiming under the sellers "with notice of the payment" and the charge can therefore be enforced against him.

The only question that remains is, what is the extent of this charge? There can be no doubt that the plaintiff has lien to the extent of the purchase money he paid and interest on that amount. We, therefore, hold that the plaintiff is entitled to a charge on the shares of defendants 1 to 3 in the property in the hands of the 7th defendant for Rs. 200 and interest on that sum at 6 per cent. from the 9th of April, 1920 to the date of payment.

The Lower Court has held that the plaintiff has a charge also in respect of the damages awarded. This is clearly wrong, for the purchaser's lien is in this country created by statute and we cannot go beyond the words of the section itself.

The decree of the Lower Court is varied to the extent we have indicated in this judgment. So far as the decree against defendants 1 to 3 is concerned, we do not propose to interfere with it in any way. The parties shall have proportionate costs throughout.

A.S.V. —— *Decree varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE PAKENHAM WALSH.

Mottaya Pillai and others .. *Accused.**

Mottaya Pillai, *In re.*

Criminal Procedure Code (V of 1898), S. 307—Reference under—Jurisdiction of High Court in—Misdirection- Jurisdiction to go into matter of —Result of trial—Interference with—Conditions.

On a reference under S. 307, Criminal Procedure Code, the High Court is, under the Full Bench ruling in *Veerappa Goundan, In re* [(1928) 55 M.L.J. 591 (F.B.)] precluded from going into any matter of misdirection or interfering in any way with the result of the trial unless the High Court is satisfied that the jury's verdict on the evidence is unreasonable. On such a reference it is the High Court which records the conviction and passes the sentence, and the accused has no right of appeal as from a Sessions Judge to the High Court.

*Reference No. 3 of 1928. 16th August, 1928.

Mottaya Pillai, *In re*.

Reconsideration of the Full Bench decision in *Veerappa Goundan, In re* [(1928) 55 M.L.J. 591 (F.B.)] suggested.

Reference under section 307 of the Code of Criminal Procedure, 1898, by the Assistant Sessions Judge of the Madura Division in Case No. 17 of his Calendar for 1928.

The Public Prosecutor on behalf of the Crown.

K. Kuttikrishna Menon for accused 4 to 6.

The Court delivered the following

Wallace, J.

JUDGMENTS. *Wallace, J.*—This is a reference under S. 307 of the Criminal Procedure Code by the Assistant Sessions Judge of Madura in a jury case before him. The offence charged was dacoity, six persons being accused. The jury returned an unanimous verdict of gulty against accused 1 to 3 and a majority verdict of 3 to 2 guilty against accused 4 to 6. With the latter verdict the Assistant Sessions Judge disagrees on the ground that the verdict is unreasonable and perverse, and he states further that, if that verdict is set aside, it implies that accused 4 to 6 were not present, whence it would follow that only three persons took part in the so-called dacoity and therefore the conviction of accused 1 to 3 must be reduced to that for an offence of robbery.

We have been taken through the evidence and the charge. As regards the latter I am of opinion that both the prosecution and the defence have much to complain of, as the charge is very defective in many points. It does not, for example, in the summary of the evidence point out that P.W. 3, one of the eye-witnesses, said that the accused 2 and 3 took part in the dacoity, or that P.W. 4, another eye-witness, said that accused 1, 2, 4 and 5 took part, or that P.W. 5, another eye-witness, said that accused 1 to 6 took part. The charge reiterates in many places that accused 4, 5 and 6 have lands. That was merely a statement made in evidence by P.W. 6 and the Assistant Sessions Judge had no right to put it to the jury as his finding of fact. It was for the jury to say whether they believed the statement or not. Again, the Assistant Sessions Judge in his charge seems to suffer under a curious obsession that it is necessary for dacoits to have known their victims previously and to have had some personal grievance against them before they would commit dacoity and he throws on the prosecution the duty of proving that accused 4 to 6 had some personal grievance against the dacoited witnesses to induce them to dacoit them and that accused 1 to 3 had some "common cause" with accused 4 to 6 against the victims. The obvious answer is that a suffiient motive to commit dacoity is the prospect of loot and

that dacoits are not in the habit of refraining from attacking a person with whom they are not acquainted. On the other hand, the charge does not emphasize on behalf of the sixth accused what should have been specifically mentioned, namely, that no identification parade was held to test the ability of the eye-witnesses to identify him, and that therefore they had not seen him since the date of the dacoity until they saw him in the dock in the committing Court several months later. The jury should certainly have been cautioned to consider deeply whether they were satisfied that the eye-witnesses had carried away such a clear recollection of the sixth accused as to be able to swear to his identity so long after the offence. A similar caution would have been wise in the case of accused 4 and 5 also, since the parade at which they were said to have been identified was nearly a month after the offence.

In other circumstances, for example, if we had been hearing an appeal against the conviction we should have had to consider whether these and other defects in the charge do not amount to serious misdirections vitiating the verdict; but as the law in this Presidency stands at present, as concluded by the Full Bench ruling in *Veerappa Goundan In re,*[1] it appears to me that we are precluded from going into any matter of misdirection or interfering in any way with the result of this trial unless we are satisfied that the jury's verdict on the evidence is unreasonable. The Full Bench in *Veerappa Goundan In re*[1] says: "The duty of the High Court is discharged in a reference by a Sessions Judge" when it expresses its agreement or disagreement with the view of the Sessions Judge "that the verdict was one which reasonable men could not have arrived at on the evidence before them," and again "it is not for us to interfere unless the verdict is unreasonable."

I feel constrained to point out that on a reference under section 307 it is the High Court which records the conviction and passes the sentence, and the accused has therefore no right of appeal as from a Sessions Judge to the High Court. The reference in fact takes away the right of appeal he would otherwise have to the High Court. The decision of the Full Bench which precludes the High Court from interfering, even to order a retrial, except when it regards the verdict as unreasonable, therefore, precludes this Court from considering whether there was in fact misdirections vitiating the verdict, although if there had been no reference, the accused would have been able to come up on appeal

1. (1928) 55 M.L.J. 591 (F.B.).

Mottaya Pillai, *In re.*

Wallace, J.

and plead such misdirections. I would respectfully suggest that the view of the Full Bench may require some reconsideration in the light of this difficulty.

I do not however regard it as necessary to move in this case for reconsideration of the Full Bench decision in spite of the misdirections as there is a quantity of evidence against 4, 5 and 6. Five eye-witnesses have identified each of these. P.Ws. 4, 5 and 6 knew them before P.W. 3 stated that accused 4 and 5 hit them and P.W. 4 states that the sixth accused hit him. Having regard to the evidence I am unable to say that the view expressed in the verdict of the jury was perverse or such that no reasonable men could take.

I must, therefore, decline to interfere or accept the reference. My learned brother agrees. The verdict of the jury must, therefore, be accepted. We, therefore, convict accused 4 to 6 of the offence of dacoity and sentence all the accused to rigorous imprisonment for five years (each).

Pakenham Walsh, J.

Pakenham Walsh, J.—I concur in the judgment of my learned brother. I should like to add that even if it should be considered that we are wrong in holding that the Full Bench decision precludes us from ordering a retrial on the ground of misdirection, the difficulty created by the Full Bench ruling is not overcome. It is the accused who is in the best position by way of appeal to point out misdirections to the jury or mistakes of law and to deprive him of his right and leave it for the High Court to discover whether real errors exist is not to substitute any adequate safeguard for the right of appeal taken away.

On the Full Bench decision the only remedy would appear to be an alteration of the Code giving the accused a right of appeal when the verdict of jury is against him and the Judge has made a reference. There appears to be no reason why accused should not be given a right of appeal under these circumstances. If he has been found guilty by a jury on a misdirection or other error of law and that conviction is to stand unless the jury's decision is found unreasonable he has clearly suffered injustice. It is inequitable that if the Sessions Judge's effort in his favour fails the accused should be in a worse position than if no reference at all had been made.

A.S.V. *Reference not accepted; accused convicted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Ramaswami Asari .. *Appellant** (*Plff.*).

Ramaswami Asari, *In re.*

Court Fees Amendment Act (Madras Act V of 1922), Art. 17 (a) (iii)—Adoption—Declaration that an, had not taken place in fact, and that, even if it had taken place, it was invalid in law—Suit for—Valuation of—Mode of.

A relief with regard to the validity or otherwise of an adoption is capable of valuation.

When a plaintiff comes into Court urging that an alleged adoption did not take place and even if it did take place it is not valid, he asks for a relief not merely with regard to the adoption but to the property which the adopted boy would acquire by means of the adoption. In other words, the value of the relief is the value of the property which the adopted boy would get if the adoption were true and valid. The value referred to in clause 17 (*a*) (iii) of the Court Fees Amendment Act means the market-value of the property.

Held, therefore, in an appeal by the plaintiff in a suit for a declaration that the defendant had not been adopted in fact and that, even if he had been adopted in fact, his adoption was invalid in law, that the valuation under clause 17 (*a*) (iii) of Sch. II to the Court Fees Act should be calculated on the market value of the property which was likely to be affected by the declaration being granted or refused.

Appeal sought to be preferred against the decree of the Court of the Subordinate Judge of Dindigul, dated 13th December, 1926 in O.S. No. 25 of 1925.

C. V. Harihara Aiyar for *Advocate-General* for appellant.

The Government Pleader on behalf of the Government.

The Court made the following

ORDER.—This is a reference of the Taxing Officer of the High Court. The terms of reference are:

"Whether, in valuing the interest that would be lost to the alleged adopted son (the 1st defendant in the present case) if the adoption be declared invalid, the market value is to be taken."

Plaintiff's suit was for a declaration that no adoption had taken place and even if an adoption had taken place, it was an invalid adoption. The appeal is by the plaintiff. He paid a Court-fee of Rs. 100 under Art. 17 (*a*) (iii) of the Court Fees Act. The office objects to the amount and requires the appellant to pay Rs. 500, that is Rs. 400 in addition, as the market value of the property is more than Rs. 10,000. It is admitted that the market value of the property in dispute is not less than Rs. 10,000. Mr. Harihara Aiyar, who appears for the appellant, contends that in a case falling under Art. 17

*S.R. No. 11458 of 1927. 31st August, 1928.

Ramaswami Asari, *In re.*

(*a*) (iii), the plaintiff is entitled to put his own valuation upon the relief claimed by him as it is not capable of valuation, and even if it be held that the relief is capable of valuation, the relief should be valued not at the market value but upon the value of the relief which would accrue to the plaintiff. The question whether a relief with regard to an adoption is capable of valuation or not need not be gone into at length. Whatever may be the view of the other High Courts, this Court has taken the view that a relief with regard to the validity or otherwise of an adoption is capable of valuation. In *Keshava* v. *Lakshminarayana*[1] it was observed that he (meaning the plaintiff) "has asked for a declaration that the adoption was not made, and that, if it was made, it was invalid. The fact and validity of the adoption is then the subject of the suit, and in valuing it for purposes of jurisdiction a computation must be made of the value of the interest that would be lost to the alleged adopted minor if the adoption be declared invalid." It stands to reason that, when a plaintiff comes into Court urging that an alleged adoption did not take place and even if it did take place it is not valid, he asks for a relief not merely with regard to the adoption but to the property which the adopted boy would acquire by means of the adoption. In other words, the value of the relief is the value of the property which the adopted boy would get if the adoption were true and valid. The argument of Mr. Harihara Aiyar is that, when a person asks for a declaration that a certain adoption is invalid or that it did not take place, he asks for a relief, which, if granted, would not benefit him as soon as the declaration is made. This argument overlooks the fact that the adopted boy, in case the adoption is declared invalid, would lose the property which he would get otherwise and the value of the relief is the value of the property the loss of which would entail on the adoption being declared invalid. Whether the plaintiff gets anything at present or not, we must consider the value of the relief as being the loss to which the defendant would be put in case the relief asked for is granted. It is conceded that in the converse case, that is, if a person asks for a declaration that he is the adopted son of *X*, the valuation of the relief prayed for would be the value of the property he would acquire by the adoption being upheld and I fail to see why a different principle should be applied when the defendant happens to be the adopted boy and the plaintiff a person who chooses to contest the factum or validity or both of the adoption.

1. (1882) I.L.R. 6 Mad. 192.

Ramaswami Asari, *In re.*

The Allahabad High Court in *Sheo Deni Ram* v. *Tulshi Ram*[2] departed from the view of this Court in *Keshava* v. *Lakshminarayana*[1] and in *Bai Machhbai* v. *Bai Hirbai*[3] this question does not directly arise. That was a case between Muhammadans. In *Prahlad Chandra Das* v. *Dwarka Nath Ghose*[4] the learned Judge followed the practice which they had been following for a number of years. I do not think that on the strength of these cases the correctness of the decision in *Keshava* v. *Lakshminarayana*[1] can in any way be questioned. It is also urged that in the case of a karnavan of a Malabar Tarwad and in the case of a trustee, the relief cannot be valued and that principle should be applied to this case. In the case of a karnavan, he does not own any property in his own individual right; he is only a manager of the Tarwad for the time being; and in the case of a trustee, it is well known that he has no personal interest in the matter though he may think much of his office as a trustee. Those cases cannot apply to a case like the present. The legislature in amending the Court Fees Act by inserting in column 3 the following, namely, "Hundred rupees, if the value for purposes of jurisdiction is less than ten thousand rupees, and five hundred rupees, if such value is ten thousand rupees or upwards," has expressed its view that a relief with regard to an alleged adoption is capable of valuation. Under the old Act, the declaration was sought on a ten rupee stamp. When the legislature advisedly enacted the clause with regard to the proper fee, it assumed that a relief in regard to an adoption was capable of valuation. This must be remembered in applying the case-law on the present case. The next question is what is the correct mode of valuation? Mr. Harihara Aiyar contends that the correct mode of valuation would be the same as in the case of a suit for possession of property. In the case of property paying land revenue, the Court Fees Act requires an *ad valorem* fee of ten times the Government assessment for suits for possession. But in the case of a house and other immoveable property, the market value is taken to be the value for purposes of court-fee. I do not see why, when a declaration is asked for in respect of property the valuation should be on the basis of the valuation in a suit for possession. The mere fact that the Court Fees Act makes a distinction in some cases between property paying land assessment to Government and other property not paying any assessment is no ground for

1. (1882) I.L.R. 6 Mad. 192
2. (1893) I.L.R. 15 All. 378.
3. (1911) I.L.R. 35 Bom. 264.
4. (1910) I.L.R. 37 Cal. 860.

Ramaswami Asari, *In re.*

importing that distinction into clause 17 (*a*) (iii) of the Court Fees Act. As it reads, it only means the market value of the property. The clause is "hundred rupees, if the value for purposes of jurisdiction is less than ten thousand rupees." In cases where possession is asked for, the valuation for purposes of jurisdiction would be the same as the valuation for purposes of court-fee. But, in other cases, the valuation for purposes of jurisdiction need not necessarily be the same as the valuation for purposes of court-fee. I, therefore, hold that in a case like this, the valuation should be calculated on the market value of the property which is likely to be affected by the declaration being granted or refused. In this view, it is unnecessary to consider the case in *Vasireddi Veeramma* v. *Butchayya.*[5] That is a case in which the question of jurisdiction was involved and no doubt there are some observations as to clause 17 (*a*) (iii), Sch. II of the Court Fees Act. The cases in *Ganapathi* v. *Chathu*[6] and *Mohini Mohan Misser* v. *Gour Chandra Rai*[7] do not touch the present point.

I answer the reference in the affirmative, that is, the market value should be taken as the value of the relief claimed for cases coming under clause 17 (*a*) (iii) of the 2nd schedule of the Court Fees Act. The Taxing Officer will give such time as is necessary for supplying the deficiency in court-fee.

A.S.V. *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Tallamraju Venkatasubba Rao .. *Petitioner** (*Plff.*)

v.

President, Taluk Board, Repalli and another .. *Respondents* (*Defts.*).

Venkatasubba Rao v. President, Taluk Board, Repalli.

Madras Local Boards Act (*XIV of* 1920), *Ss.* 21 *and* 225—*Suit against Taluk Board—President engaging vakil to defend—Previous sanction of Board, if necessary—Liability of Board to pay the vakil—Suit by Board as plaintiff—Distinction—Suit by vakil against Board for remuneration and out-fees spent in defending the suit—Limitation.*

The President of a Taluk Board has power to instruct a vakil, without obtaining the previous sanction of the Board, to defend a suit filed against the Board and the Board is bound to pay the vakil. But, if the Board is to

*C.R.P. No. 321 of 1927 26th March, 1928.

5 (1926) I.L.R. 50 M. 646 : 52 M.L.J. 381.

6. (1889) I.L.R. 12 Mad. 223. 7. (1920) 5 Pat. L.J. 397.

Venkata-subba Rao v. President, Taluk Board, Repalli.

sue as plaintiff, it may be necessary for the President to obtain the sanction of the Board for instituting the suit.

Section 225 of the Local Boards Act applies to cases of alleged neglect or default of some officer in the execution of an act authorised by law and does not apply to a suit where the Taluk Board is sued for a debt due by it.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree, dated the 21st September, 1926, of the Court of the District Munsif of Tenali in S.C.S. No. 79 of 1926.

P. Satyanarayana Rao for petitioner.

K. Bhimasankaram for *B. Satyanarayana* for Taluk Board.

V. Pattabhirama Sastri for former President.

The Court delivered the following

JUDGMENT.—This is an application to revise the decree of the District Munsif, Tenali, dismissing the plaintiff's suit. The plaintiff is a vakil in Tenali. He appeared to defend two suits filed against the Taluk Board, Repalli, under instructions from the then President of the Taluk Board. After the termination of the suits, he sent in his bill for payment. The present President is not the person who instructed him to appear and the Board now objects to pay the bill. The District Munsif dismissed the plaintiff's suit on the ground that there was no provision in the Local Boards Act empowering the President to engage a vakil to work in suits by and against the Taluk Board without the sanction or approval of the Board. The question is whether the President of a Taluk Board has power to instruct a vakil to defend a suit without obtaining the previous sanction of the Board. Section 21 of the Local Boards Act is the section which empowers the President to exercise executive power and clause (2) which restricts the power is as follows:

"It shall not be lawful for the President to exercise any power which by this Act it is expressly declared shall be exercised by the Local Board."

No provision of the Local Boards Act was brought to my notice which in any way restricts the power of the President of the Board to engage a vakil to conduct cases brought against the Board. If the Board is to sue as plaintiff, it may be necessary for the President to obtain the sanction of the Board for instituting a civil suit. But where suits are brought against the Board and where it is necessary to defend a suit in time, it cannot be said that the President has no power to instruct vakils for

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the purpose of appearing in Court lest the Court should decree *ex parte* against the Board. So long as there is no restriction on his power to defend suits I do not think it can be said that it is not within the ordinary powers of the President to engage vakils to defend suits brought against the Board.

The next question is whether the Board is bound to pay a vakil who has worked for the Board when there is no express sanction of the Board to engage a vakil. I think this question has to be decided on the principle of part performance. Where the Board has had the benefit of the service of the vakil and as in this case where out-fees have been paid on behalf of the Board by the vakil, it is not open to the Board to say that it is not liable to pay the amount the benefit of which it had in the way of defending the suit and in the way of out-fees which were paid by the vakil during the conduct of the suits. I think it is highly inequitable that a public body like the Board should engage a vakil through its President and when the vakil sends in his bill after the termination of the suits should turn round and say that the President has no power to engage a vakil without the permission of the Board to defend a case brought against it. I think it is not merely inequitable but highly dishonest to take up such an attitude especially in a case where there is nothing shown against the vakil's *bona fide* belief in the power of the President to engage him to conduct cases and to allow him to pay out-fees out of his pocket.

It is urged on behalf of the respondent (Board) that inasmuch as there was no resolution of the Board authorising the President to engage the vakil, the Board is not liable. Where the President *bona fide* acts on behalf of the Board and where the Board gets the benefit of such an act, I think it is not open to the Board to deny liability which arises from the benefit which it gets.

A contention is raised on behalf of the respondent that no notice was given as required by the Act. This point is one of fact and it was not raised in the Lower Court and it is not therefore open to the respondent to raise it here.

Another point raised on behalf of the respondent is that the suit was not brought within six months as provided by section 225 of the Act and therefore the suit is barred by limitation. S. 225 does not apply to cases of this kind. It applies to cases of alleged neglect or default of some officer in the execution of an act authorised by law. Where the Board is sued

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for a debt due by it, the ordinary law of limitation, namely, three years, applies and not six months as provided by S. 225 of the Act. I hold that the suit is within time and the plaintiff is entitled to a decree.

I, therefore, set aside the decree of the Lower Court and direct that a decree for the sum sued for and costs be passed in plaintiff's favour together with the costs of this application.

The 2nd defendant being the old President is not liable and the petition, so far as he is concerned, is dismissed without costs.

N.S. *Petition allowed against 1st deft. but dismissed against 2nd deft.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Godasankara Vila Rajah Avergal of Punnathur .. *Petitioner**

v.

The Board of Commissioners for Hindu Religious Endowments, Madras .. *Respondents.*

Godasankara Vila Rajah v. Board of Commissioners for Hindu Religious Endowments, Madras.

Religious Endowments Act (II of 1927), S 84—Application under—Court-fee payable on—Art. 17 (1); Art. 17-A (1) of Madras Court Fees Amendment Act of 1922—Applicability—"Civil Court" in Art. 17 (1)—Meaning of—Board of Commissioners for Hindu Religious Endowments Board not a Civil Court within meaning of that Article.

The proper court-fee payable on an application under S. 84 of the Religious Endowments Act II of 1927 is that fixed by Art. 17-A (1) and not that fixed by Art. 17 (1) of the Madras Court Fees Amendment Act, 1922, Sch II.

"Art. 17" of Sch. II of the Madras Court Fees Amendment Act, 1922, referred to in Sch II of the Religious Endowments Act II of 1927 includes the whole of that Article consisting of its component parts.

An application under S. 84 of the Religious Endowments Act, 1927, comes within Art. 17-A (1) of the Madras Court Fees Amendment Act of 1922.

The Board of Commissioners for Hindu Religious Endowments is not a Civil Court within the meaning of Art. 17 (1) of the Madras Court Fees Amendment Act of 1922.

Meaning of "Civil Court" in Art. 17 (1).

Petitions under sections 115 of Act V of 1908 and 107 of the Government of India Act to revise the orders of the District Court of South Malabar, dated 12th, 13th, 19th and 24th Sept., 1927 respectively in O.P. Nos. 40, 41, 75, 130 and 131 of 1927.

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*C.R.P. Nos. 1631 to 1635 of 1927. 23rd April, 1928.

Godasankara Vila Rajah v. Board of Commissioners for Hindu Religious Endowments, Madras.

Phillips, J.

K. Krishna Menon for petitioner.

P. Venkatramana Rao for respondents.

The judgment of the Court was delivered by

Phillips, J.—The question that is raised here is what is the proper court-fee payable on an application under section 84 of the Religious Endowments Act II of 1927. Schedule II of that Act says that it shall be the fee leviable on a plaint under Art. 17, Schedule II of the Madras Court Fees Amendment Act, 1922. It is contended here that, inasmuch as Art. 17 is specified, it does not include Art. 17 (*a*) or 17-(*b*), but when the whole Article is referred to it must include its component parts and it cannot be read as meaning Art. 17 alone; for, if that were done, Arts. 17 (i), (ii) and (iii) would equally have to be excluded and there would be no provision applicable except Art. 17 which is only a preliminary heading to the various parts of the Article numbered as (i), (ii), (iii), A, B, etc. We are clearly of opinion that "Art. 17" must be deemed to include the whole of Art. 17 consisting of (i), (ii) and (iii), 17-A (i), (ii) and (iii) and 17-B.

The next question is whether this application comes under Art. 17 (i) "to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court," or whether it comes under Art. 17-A (i) "to obtain a declaratory decree where no consequential relief is prayed." The application is to set aside the order of the Religious Endowments Board and to declare that the plaint temple is a private temple. This certainly would come within Art. 17-A (i) for no consequential relief is prayed and a declaratory decree is asked for. But it is contended that the more favourable form of taxation must be applied if possible to the petitioner and that as the fee under Art. 17 (i) is less than that under Art. 17-A (i), the former Article should be applied here, and it is contended that the Board of Commissioners for Hindu Religious Endowments is a Civil Court within the meaning of that Article. There is nothing in the Act to justify that contention, for the Board is nowhere referred to as a Court and, although it has power to take evidence and decide questions in a judicial manner, that does not necessarily make it a Civil Court. It has been held by a Full Bench of this Court in C.R.P. Nos. 1027 and 1028 of 1924 and 301 of 1925 that the Board of Revenue exercising jurisdiction under certain sections of the Estates Land Act is not a Civil Court subject to the revisional powers of this Court. Amongst the arguments put forward against the pro-

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position was that a Revenue Court is deemed to be a Civil Court in certain respects, but when the Court Fees Act makes a distinction between Civil Courts and Revenue Courts, it is obvious that it is not in the sense that a Revenue Court may be said to be a Civil Court that the expression "Civil Court" is used. It apparently refers to Civil Courts such as are contemplated by the Code of Civil Procedure, namely, Courts which have general powers of trying civil disputes and not Courts with such a power limited to cases of one particular kind. There therefore appears to be no ground for holding that this Board of Commissioners is a Civil Court within the meaning of that Article. If that is so, that Article cannot apply to the present application which must fall under Art. 17-A (i) as has been held by the District Judge. The revision petitions, therefore, fail and are dismissed with costs, one set. Time for payment of court-fee extended by two months from date of receipt of this order in the Lower Court.

A. S. V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI.

K. G. Ethirajulu Chetty .. *Plaintiff**

v.

A. P. Rajagopalachari and others .. *Defendants.*

Ethirajulu Chetty v. Rajagopalachari.

Civil Procedure Code (V of 1908), O 40, R. 1—Mortgage—Simple mortgage—Suit to enforce—Receiver for receiving rents of mortgaged property and paying them over to mortgagee—Appointment of—Jurisdiction—Discretion—Condition.

While Courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage is a simple mortgage, there may be circumstances created either by the conduct of the mortgagor or connected with the state of the property which may render it necessary in the interests of justice and for the protection of the mortgagee that a Receiver should be appointed. It is impossible to lay down a hard and fast rule laying down under what circumstances the Court will appoint a Receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage and allow possession to remain with the mortgagor which loss could not be compensated except by the appointment of a Receiver.

K. S. Krishnaswami-Aiyangar and *A. Suryanarayana* for plaintiff.

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*C. S. No. 473 of 1928. 20th November, 1928.

Ethirajulu Chetty v. Rajagopalachari.

P. S. Ramaswami Aiyangar for defendants.

The Court delivered the following

JUDGMENT.—This is an application for the appointment of a Receiver by the plaintiff who has filed the suit on a registered deed of mortgage, dated the 15th of February, 1926 for Rs. 23,238-3-5 repayable with interest at 12 per cent. per annum alleged to have been created by the 1st defendant and his deceased brother for the recovery of Rs. 31,190-8-3 with costs and further interest.

The affidavit in support of the application states that the properties yield a rent of Rs. 145 a month, while the monthly interest accruing due is Rs. 300, that the defendants are not paying the interest which they are bound to pay under the deed of mortgage but are enjoying the rents of the properties themselves, that the value of the properties has considerably diminished and it is not possible to recover the amount by a sale of the properties, that a very large sum is due for interest alone and that it is necessary that a Receiver should be appointed for the purpose of receiving the rents and paying them over to the plaintiff so that he may not incur further loss.

The 4th and 5th defendants are the minor sons of the deceased executant of the mortgage and they oppose the application. They deny that the mortgage is binding on them and that the value of the properties has diminished or that there is any fear of the plaintiff not being able to recover the amount due. They state that the plaintiff cannot have in law a Receiver appointed as he is only a simple mortgagee and that this application is virtually one for getting possession which he is not entitled to under the mortgage.

On the merits I am of opinion that this is a fit case for the appointment of a Receiver. But the question, however, arises whether the Court has power to appoint a Receiver at the instance of a simple mortgagee or other person who is not entitled to possession of the properties.

Order 40, Rule 1 of the Civil Procedure Code enacts that where it appears to the Court to be just and convenient, the Court may by order

(*a*) appoint a Receiver of any property, whether before or after decree;

(*b*) remove any person from the possession or custody of the property;

(*c*) commit the same to the possession, custody or management of the Receiver; and

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(*d*) confer upon the Receiver the powers mentioned therein.

Sub-rule (2) provides that nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

I may point out that under the previous Code of 1882 the Court had power to appoint a Receiver for the realisation, preservation or better custody or management of any property, moveable or immoveable, the subject of a suit, or under attachment. The proviso to the section says that nothing in the section authorises the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.

There can be little doubt that there is a material variation between the old and the new Code.

The argument for the defendants is that a simple mortgagee has only the right to bring the property to sale and that during the continuance of the mortgage he has no right to possession, and he cannot indirectly by asking for a Receiver get possession. It is also argued that the plaintiff who has no present right to possession cannot ask that the defendants who are entitled to possession should be removed.

The authorities on this question are conflicting.

In *Chockalingam Pillai* v. *Pichappa Chettiar*[1] it was held by Sir Murray Coutts Trotter, C.J. and Wallace, J., that the Court cannot appoint a Receiver in a suit for the specific performance of an agreement to sell certain properties and to give a simple mortgage of certain other properties. The learned Judges observe:

'Mr. T R. Ramachandra Aiyar for the appellant contends that at any rate so far as the B Schedule properties are concerned, it is not open to the Lower Court to appoint a Receiver, the point being that the Lower Court cannot by way of Receivership do what it would not be entitled to do even by way of decree. At the highest, the plaintiff is entitled if he succeeds only to a simple mortgage on these properties, and having obtained this simple mortgage he could not immediately sue for possession. He is not entitled on a simple mortgage to possession The most he could do is to enforce a sale on foot of the mortgage. We think that this argument is

1. (1925) 22 L. W. 579.

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sound and that the Lower Court was not justified in appointing a Receiver so far as the B. Schedule properties are concerned."

In *Gobind Ram* v. *Jwala Pershad*[2] it was held by Sir Henry Richards, C.J. and Banerji, J., that in the case of a simple mortgage the mortgagor is entitled to remain in possession till the property is sold and the fact that the security is not sufficient and the property is deteriorating is no ground for the appointment of a Receiver.

A contrary view has been taken in several cases.

In *Arunachalam Chettiar* v. *Manicka Varaher Desikar and others*[3] it was held that a Receiver can be appointed after the decree on a mortgage where the decree-holder has been restrained by injunction from selling the mortgaged property and the security was insufficient for the realisation of the decree amount by sale. Reference was made to *Ganshyam Misser* v. *Gobinda Moni Dasi.*[4]

In *Paras Ram v. Puran Mal-Ditta Mal*[5] it was held that there is nothing in Order 40, Rule 1 of the Civil Procedure Code which excludes mortgage suits from its operation and a Receiver can be appointed in a mortgage suit, that the Code gives the widest power to the Court to appoint a Receiver when it appears to the Court to be just and convenient and that the right to recover the rents and profits is not necessary to enable the plaintiff to obtain a Receiver. It was also held that a Receiver can be appointed if the security was insufficient for the realisation of the decree amount by the sale of the mortgaged property.

In *Musstt. Khubsurat Kuer* v. *Saroda Charan Guha*[6] Mukerjee and Carnduff, JJ., in dealing with the contention that the appointment of a Receiver in a mortgage suit is premature because the mortgagee is not under the mortgage decree entitled to appropriate the profits of the properties given as security observe:

"In so far as the second contention is concerned, it has been urged that the object of the appointment of a Receiver in a mortgage suit is to secure the application of the profits of the mortgaged properties for the benefit of the mortgagee. If the decree is for sale, and if it is established that the security is not sufficient to satisfy the judgment-debt, a Receiver will be appointed almost as a matter of course, specially if there has been default in the payment of interest."

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2. (1917) 43 I.C. 533.
3. (1909) 6 M.L.T. 238.
4. (1902) 7 C.W.N. 452.
5. (1923) 85 I.C. 737.
6. (1911) 16 C.W.N. 126.

The learned Judges refer to *Weatherall* v. *Eastern Mortgage Agency Co.,*[7] *Hopkins* v. *Worcester and Birmingham Canal,*[8] *Herbert* v. *Greene*[9] and *Hackett* v. *Snow.*[10]

In *Manindra Chandra Ray* v. *Suniti Bala Debi* [11] it was held that the Court can appoint a Receiver at the instance of a mortgagee, where the action is either for foreclosure or sale if the security is insufficient or if the interest is in arrears.

In *Ram Kumar Lal* v. *Chartered Bank of India, Australia and China* [12] it was held that in a suit on a mortgage a Receiver could be appointed.

In *Gobind Rani* v. *Brinda Rani* [13] it was held that where a mortgagee applies for the appointment of a Receiver, the proper question for consideration is what steps should be taken to protect the mortgagee.

In *Rameshwar Singh* v. *Chuni Lal Saha*[14] the learned Judges Mookerjee and Panton, JJ., observe:

"There is no foundation for the contention that a mortgagee who is not entitled to possession of the mortgaged properties is not entitled to ask for the appointment of a Receiver. Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a Receiver, if the demands of justice require that the mortgagor should be deprived of possession. The principle applicable to cases of this character was lucidly stated in the case of *Herbert* v. *Greene.*[9]

In *Jaikissondas Gangadas* v. *Zenabai and Kasi Mahomed Miya Dada Miya* [15] it was held that the Court has power to appoint a Receiver in the case of a suit by a mortgagee for foreclosure or sale.

In *Venkata Rajagopala Surya Row Bahadur* v. *Basivi Reddi*[16] Oldfield, J., was of opinion that the Court has power to appoint a Receiver of the mortgaged properties where a decree has been passed for sale on a simple mortgage even though the personal remedy is barred by limitation. The learned Judge refers to and distinguishes some of the cases contra.

Sadasiva Aiyar, J., in dealing with the contention of the appellant that unless the mortgagee was entitled to immediate possession of the corpus of the mortgaged property or at least to the immediate receipt of the rents and profits, the Court has

7. (1911) 13 C.L.J. 495.
8. (1868) L.R. 6 Eq. 437.
9. (1854) 3 Ir. Ch. 270 at 274.
10. (1847) 10 Ir. Eq. 220.
11. (1926) 95 I.C. 632.
12. (1924) 87 I.C. 375.
13. (1915) 23 C.L.J. 440.
14. (1919) I.L.R. 47 C. 418.
15. (1890) I.L.R. 14 B. 431.
16. (1914) 29 M.L.J. 457.

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no power to appoint a Receiver, considers that the existence of the right to recover the rents and profits is not an indispensable prerequisite and points out the distinction between Order 40, Rule 1 which follows the Judicature Act of 1873, section 25, and section 503 of the old Code which gave the Court power to appoint a Receiver only when it was "necessary for the realisation, etc." of a property, "the subject of a suit or attachment." The learned Judge, however, was of opinion that when the personal remedy was barred, a Receiver ought not to be appointed. He states that if the corpus is likely to deteriorate by acts of waste committed by the judgment-debtor, a Receiver could be appointed.

So far as the law in England as regards Receivers is concerned, equitable mortgagees have obtained orders for the appointment of Receivers.

In re Crompton & Co., Ltd.: *Player* v. *Crompton & Co., Ltd.*[17] Warrington, J., observes at page 967:

"I think the right to the appointment of a Receiver is one of the ordinary rights which accrue to a mortgagee, and especially to an equitable mortgagee who has no means of taking possession and whose security has become realisable as one of the steps in such realisation."

In *Hopkins* v. *Worcester* and *Birmingham Canal*,[8] Sir G. M. Giffard, V.C., was of opinion that a creditor whose principal has become due and who has given notice of demand is entitled to a Receiver *ex debito justitiae*.

I may also refer to the decisions of Srinivasa Aiyangar, J., in C.S. Nos. 399 of 1925 and 881 of 1925, where the learned Judge was of opinion that the Court has power to appoint a Receiver in the case of a simple mortgage although it can only make such an appointment where special circumstances are shown.

In C.S. No. 227 of 1928 I was of the opinion that a Receiver cannot be appointed, following the decision in *Chockalingam Pillai* v. *Pichappa Chettiar*.[1] In that suit the authorities to the contrary referred to by me above were not cited and there was practically no argument.

Having regard to the authorities I think the proposition stated by me that no Receiver can be appointed in a simple mortgage suit at the instance of a simple mortgagee is too wide. I think the result of the authorities is that while the Courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage is a simple mortgage, there

1. (1925) 22 L.W. 579.

8. (1868) L.R. 6 Eq 437.

17. (1914) 1 Ch. 954.

may be circumstances created either by the conduct of the mortgagor or connected with the state of the property which may render it necessary in the interests of justice and for the protection of the mortgagee that a Receiver should be appointed. It is impossible to lay down a hard and fast rule laying down under what circumstances the Court will appoint a Receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage and allow possession to remain with the mortgagor which loss could not be compensated except by the appointment of a Receiver. Ethirajulu Chetty v. Rajagopalachari.

I think having regard to the facts of the present case—the default of the mortgagors in paying the interest and the fall in value of the mortgaged properties—a Receiver should be appointed.

A.S.V. *Application allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.

Manickavachaga Desikar and others .. *Appellants** (*Defts.*)

v.

Paramasivan *alias* Ramaswami Desikar and others .. *Respondents* (*Plffs.*).

P. C.

Manickavachaga Desikar v. Paramasivan.

Office—Spiritual guru—Office of—Appointment to—Right of—Last holder of office—Right of—Family of last holder in default of appointment by him—Right of—Evidence—Hereditary right to appoint to office—Legal right if a—Right if may vest in a family—Exercise of right by family in favour of non-member—Validity of—Guru or spiritual minister—Choice of—Gifts to—Right of—Freedom as regards—Interference by Court with—Injunction—Spiritual minister—Imparting of Upadesam *and receipt of gifts by—Injunction restraining—Legality—Acts done by him in individual capacity—Acts done by him* colore officii—*Distinction.*

Any one who pays fees or gives gifts in respect of spiritual benefits, may, so long as it is a voluntary business, choose whom he thinks right to be his minister in spiritual things, and to be the recipient of his fees or gifts.

The hereditary right to appoint to an office is a possible legal right. That right may, according to law, vest in a family, and be exercised by appointing some one who is not a member of the legal family.

The question was as to the right to appoint to the office of priest or Kilamadam Swamiyar of the Nattukottai Nagarathars.

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*P.C. Appeal No. 167 of 1924. 30th November, 1928.

P. C.
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Paramasivan.

Held, on the evidence, affirming the Courts below, that, according to the usage of the institution in question, the right of appointment vested in the first instance in the last holder of the office, and that, in default of appointment by him, the right vested in the family of the last holder.

Though a person may not, in his individual capacity, be restrained by injunction from imparting *Upadesam* or receiving fees therefor, he may be restrained from so doing *colore officii*.

Appeal No. 167 of 1924 from a judgment and decree, dated the 22nd April, 1921, of the High Court, Madras (Wallis, C.J. and Krishnan, J.) affirming a judgment and a decree, dated the 31st December, 1917, of the Temporary Subordinate Judge of Sivaganga.

The sole question for decision in this appeal was whether the first respondent's appointment to the office of Gurusthanam of the Nattukottai Nagarathars by the members of the family of the last holder was valid.

The High Court held that the usage of the institution was for one Gurukkal to nominate his successor as in the case of other Mutts in Southern India; that the family of the parties had made two appointments; and that, therefore, the usage of the institution was that, in default of appointment by the Guru, the appointment was in the family of the parties; and it was unlikely that Chetti disciples had ever appointed a Gurukkal. The learned Chief Justice concluded his judgment as follows:—

"We think that the inference as to the usage of this institution which arises from the evidence is that, in default of appointment by the Guru, the appointment is in the family. We agree in this respect with the Subordinate Judge. We cannot expect in a class of institution like this frequent cases of failure to appoint a successor by the Guru in his life-time. We find that there were two such cases, when Satyagiri and Ramaswami were appointed, during the last 100 years; and these appointments were made by the family of the plaintiffs. I will go further and say that it seems to me much more natural and likely that the appointment should be in the family than that it should be in a large body of Chetties as that of Nattukottai Chetti Nagarathars, who, as I have stated, consist of thousands of families."

De Gruyther, K.C. and *Parikh* for appellants.

Upjohn, K.C. and *Narasimham* for respondents.

De Gruyther, K.C.—The right of appointment is in the Chetties.

[*Sir Lancelot Sanderson*.—How do you show that the power of appointing the Guru ever got into the hands of the Chetties?]

Because they provided the funds.

P. C.

Manickavachaga Desikar v. Paramasivan.

The following cases were cited during the argument:—*Greedharee Doss* v. *Nundokissore Doss Mohunt*,[1] *Rajah Muttu Ramalinga Setupathi* v. *Perianayagum Pillai*[2] and *Janoki Debi* v. *Gopal Acharjia Goswami*.[3]

Counsel for the respondents were not called upon.

30th November, 1928. Their Lordships' judgment was delivered by

Lord Phillimore

LORD PHILLIMORE.—The plaintiffs in this suit who are respondents in this appeal claimed that they and the defendants were members of a joint undivided Hindu family, that the right to appoint to the office of Kilamadam Swamiyar vested in the family, and that the first plaintiff had been appointed to the office by the members of the family and installed and was entitled to hold the office. The defendant No. 1, however, had unlawfully claimed to have appointed to the office his infant son, defendant No. 2. The plaintiffs, therefore, brought this suit against defendants Nos. 1 and 2 and certain other members of the family, and claimed a declaration that the first plaintiff was the lawful holder of the office and an injunction restraining defendants Nos. 1 and 2 from setting up the title of defendant No. 2 and from imparting *Upadesam* as such Swamiyar or from receiving the fees and perquisites of the said office, and from receiving any portion of the income of the said Kilamadam village. The plaintiffs also claimed that delivery should be given to the first plaintiff of certain idols, vessels and jewels. The first and second defendants denied that the right to appoint to the office in question rested with the family, said that neither the plaintiffs nor the defendants had any such right of appointment and submitted that such a right would be invalid in law. They claimed title for the second defendant as having been appointed by the last previous holder.

The seventh defendant set up in his turn a similar appointment by the last holder.

The plaintiffs applied to amend their claim and the amendment was, after certain interlocutory proceedings, allowed. By the amendment they set up an alternative case according to which the primary right to appoint vested in the last office-holder and the right of the family only accrued by way of lapse if the

1. (1867) 11 M.I.A. 405 at 421, 423, 428
2 (1874) L.R. 1 I.A. 209 at 228.
3. (1882) L.R. 10 I.A. 32 : I.L.R. 9 C. 766 (P.C.).

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last office-holder had failed to appoint, and they averred that he had failed to appoint and that the right, therefore, had accrued to the family.

Both the Subordinate Judge and the High Court on appeal held that neither defendant No. 2 nor defendant No. 7 had been appointed as they severally alleged by the last office-holder. Both Courts held that the last office-holder had died without making any appointment.

The seventh defendant has not appealed. The first and second defendants are now appealing to His Majesty, but they have not sought to disturb the concurrent decisions of the two Courts on this head. They are now relying only upon their title by possession and the supposed infirmity of the plaintiffs' title.

There is no doubt that in some sense there has been a religious institution at this place from the twelfth century. However the priesthood may have descended previous to the year 1803, it is known that at that date one Minakshinatha was the Guru or Swamiyar and that he had a brother named Perumal, that the office passed from Minakshinatha to Perumal's daughter's son, one Subramania, whether by virtue of the family's claim to appoint or by nomination of the last holder, is not certain; that Subramania was succeeded by Ramaswami Aiyar, who was the younger brother of Kalyanasundaram Aiyar, both being grandsons of Perumal in the male line. How Ramaswami Aiyar came to be appointed is not clear, but when he died in the lifetime of his elder brother, the elder brother took possession of the village and the building, and when his claim to the rents of the village was disputed on the ground that they belonged to the Guru, and that there was no Guru, and that he as a married man could not be Guru, he bought a boy named Satyagiri and purported to constitute him Guru, having made an agreement with the boy through his guardian that he, Kalyanasundaram, should receive the emoluments appertaining to the office, making a certain allowance to the actual holder Satyagiri.

When Kalyanasundaram died, leaving a widow Minammal and two sons, the widow continued to occupy and manage the property, with Satyagiri continuing as Guru for some years. Then he quarrelled with her, ceased to be an ascetic, which was a necessary condition of being the Guru, married and went away in the year 1854, having been in office since 1836. Minammal then, whether in her own right or as acting for her sons, who

were both still infants, appointed the younger one, Ramaswami Desikar, who died in 1907.

Thereupon the office remained vacant for a considerable time, but eventually in 1913 the present plaintiff, No. 2, was appointed by his family, and on 25th April in the same year he and his father brought the present suit.

That, in the first instance, the right of appointment belongs to the predecessor, and that any patron or patrons who appoint a Guru will by so doing part at the same time with the right to future appointments so long as each Guru in turn appoints his successor, cannot now be disputed. The plaintiffs in effect gave up the primary title under which they had at first claimed, and the Courts have decided against it. But if the Guru for the time being dies or resigns before appointing his successor, who is to appoint?

One suggestion made for the appellants was that some family or families of the Chetty caste to whom the Guru imparts *Upadesam* may be held to have a proprietorship in the emoluments of the office, and to have thereby acquired the right to appoint. That any one who pays fees or gives gifts in respect of spiritual benefits may, so long as it is a voluntary business, choose whom he thinks right to be his minister in spiritual things, and to be the recipient of his fees or gifts, is certain, and if these Chetty families think well to treat the second or the seventh defendant as their personal Guru, the Court cannot say nay. But if a Chetty family or a congeries of Chetty families may be patrons according to law, so might the plaintiff family be patrons, and the claim made for the Chetties has no support from the actual practice.

The only other suggestion to make, and this does not seem to have been mentioned till the case came before their Lordships' bar, was that the patronage in case of lapse devolved upon the Government; but no sufficient reason was given in support of this eleventh-hour suggestion.

Still, no doubt, the plaintiffs must show a title under which they can recover. According to law the right of patronage may vest in a family, and this patronage may be exercised by appointing some one who is not a member of the legal family, as in the case of Subramania, who, though a relation in blood, derived his descent in the female line. Such an appointment might carry with it the danger that Subramania might have exercised his power by appointing a successor from his father's family. But

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he did not, and their Lordships find that the next Guru was a member of the plaintiffs' family in the male line. When he died, his elder brother successfully claimed to appoint the successor, being the boy whom he bought for this purpose. When that boy retired, the representative of the plaintiffs' family, possibly with the consent of other members, at any rate, acting for all the male descendants of Kalyanasundaram, appointed the fifth Guru, who was in undisturbed possession for 53 years. If the hereditary right to appoint to the office is a possible legal right, and in their Lordships' opinion it is a possible legal right, there is sufficient evidence of its exercise. It must be remembered that the right now supported is not a right to appoint on every vacancy, but only a right to appoint by lapse, and therefore a right which would only occur at rare intervals. Their Lordships think that the conclusion at which the Courts in India have arrived is sound.

There is, however, a certain correction to be made in the form of the decree of the Subordinate Judge, which was affirmed in terms by the High Court. Part of the decree is expressed in these terms:—

> "That the defendants 1 and 2 be and are hereby restrained from setting up the title of second defendant as Kilamadam Swamiyar or Pandyanattu Mudanmaiyar Esanya Sivacharyar from imparting *Upadesam* as such Swamiyar or from receiving the fees and perquisites of the said office and from receiving any portion of the income of the said Kilamadam village."

Their Lordships on first perusal saw some cause to hesitate in supporting a decree which might seem to interfere with the religious practices and obligations of Hindu worshippers; but it was pointed out to them that it was not proposed to restrain the second defendant from imparting *Upadesam* or receiving fees therefor, but only from so doing *colore officii* as Kilamadam Swamiyar. So taken, it may stand so far.

Then with regard to the restraint from receiving any portion of the income from the village, it was pointed out to their Lordships that some of the Chetties who were supporting the appellants in this appeal were in receipt of the income or some of the income from the village, which, so long as they received it, they might give to whom they pleased, and, therefore, if they so pleased, to the second defendant. To meet this difficulty it was suggested that after the word village should be added the words "payable to the Swamiyar as such." This variation will not affect the incidence of the costs.

Their Lordships will therefore humbly recommend His Majesty that, subject to this variation in the form of the decree of the Subordinate Judge, this appeal should be dismissed with costs.

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Solicitors for appellants: *Douglas, Grant & Dold.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Gulam Hussein Ahmed Somaji .. *Appellant**

v.

The Land Acquisition Officer, South Salsette, Bandra .. *Respondent.*

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Land Acquisition Act (I of 1894), S. 23—Market value—Evidence—Sale of other land in the neighbourhood 15 months before—Value of.

Sale of other land in the neighbourhood, with similar advantages, nearly 15 months before, is cogent evidence as to the market value of land acquired by Government under the Land Acquisition Act, I of 1894, when nothing is shown to have happened which materially affected the value of the land between the date of such sale and the Government's declaration for acquisition.

Consolidated Appeal No. 70 of 1927 from two decrees of the High Court of Judicature at Bombay, (McLeod, C.J. and Coyajee, J.), dated the 17th December, 1925, varying two decrees of the Court of the Assistant Judge of Thana, dated the 24th September, 1923.

The material facts of the case are set out in their Lordships' judgment, and also in the report of the case in the High Court. See *Land Acquisition Officer* v. *Gulam Hussein* [(1925) 28 Bom. L.R. 714].

W. H. Upjohn, K.C., E. B. Raikes and *Sir Thomas Strangman* for appellant.

Sir G. R. Lowndes, K.C. and *K. Brown* for respondent.

Lowndes.—The appeal to the Privy Council is not competent. It involves no question of law or principle, but only a question of valuation.

Nowroji Rustomji Wadia v. *The Government of Bombay* [(1925) L.R. 52 I.A. 367: I.L.R. 49 B. 700: 49 M.L.J. 233 (P.C.)] referred to.

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*P.C. Appeal No. 70 of 1927. 16th October, 1928.

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16th October, 1928. Their Lordships' judgment was delivered by

LORD CARSON.—This appeal relates to two references under the Land Acquisition Act as to the compensation which the Bombay Government should pay to the appellants for certain lands situated in the Island of Salsette, near Bombay, which they had acquired under the said Act. The appeal relates to two plots only. One was of about 15 acres and 6 gunthas in the village of Vadhwan, and the other of about 36 acres and 8 gunthas in the neighbouring village of Malad. Both the plots were in hills and were chiefly valuable for the building stone of good quality which underlies the surface. The third appellant who is substantially the only appellant, had then started quarrying in some of the hills and had purchased the Vadhwan land in question on the 30th November, 1919, for 7½ annas a square yard.

The Government's declaration under which both plots were acquired was published on the 10th February, 1921, and it is the market value of the land at that date to which the appellant is entitled. The Salsette Development Officer awarded compensation on the footing that the market value of the land was Rs. 500. But the Assistant Judge and the High Court before whom the question was subsequently considered on appeal have both disregarded this valuation.

The Assistant Judge of Thana, on the 24th September, 1923, decreed compensation to the appellants for all the land in question at 7½ annas a square yard, or Rs. 2,262-8-0 an acre, being at the same rate as the third appellant had acquired the Vadhwan land in question on the 30th November, 1919, as already stated.

He examined the facts as to the sale and purchase by the appellant of the said land and came to the conclusion that nothing was shown to have happened which materially affected the value of the land between that purchase and the date of the Government's declaration for acquisition, and therefore held that that sale was evidence of weight as to the market value of the two hills in question. On appeal, the High Court of Judicature at Bombay, by its judgment, dated the 17th December, 1925, reduced the award to Rs. 1,000 per acre. The learned Chief Justice who delivered the judgment of the Court, referring to the sale and purchase by the appellant in November, 1919, said:

"If that sale had taken place about February, 1921, it would be good evidence that there was competition for such land so that it was worth in

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the market 7½ annas a square yard. 'But,' he added, 'by February, 1921, it is certain that such circumstances as had existed from the middle of 1919 until the end of 1920 had begun to lose their force, and it is doubtful whether any purchaser would have come forward to pay a high price for these lands on the chance of reaping a profit by opening quarries'."

Sir George Lowndes, who appeared for the respondent, very fairly said he did not contest the proposition of the Chief Justice as to evidence of value, and the only question therefore that remains is to see whether there was proper evidence to support the statement of the Chief Justice that the circumstances existing from November, 1919, until the end of 1920 had begun to lose their force by February, 1921.

The learned Chief Justice does not himself refer to any evidence supporting his conclusion nor have their Lordships been referred to any such evidence. In fact, such evidence as was given did not support the suggestion of any such change until the later part of 1921. It is only necessary to refer to the respondent's own witness on the subject, Mr. E. M. G. Lodge (Land Manager, Development Director, etc.), who stated:

"There was some activity in the building trade in Bombay and elsewhere in 1920 and the earlier part of 1921. In the latter part of 1921 slump took place."

In the absence of evidence their Lordships are unable to find any reason for differing from the conclusion arrived at by the Assistant Judge, and they are accordingly of opinion that this appeal should be allowed, that the two decrees of the High Court of Judicature at Bombay, dated the 17th December, 1925, should be set aside, and that the two decrees of the Court of the Assistant Judge at Thana, dated the 24th September, 1923, should be restored. The respondent must pay the costs of this appeal and of the appeals in the High Court of Bombay.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.

Srimati Sarat Kumari Bibi .. *Appellant**

v.

Rai Sakhi Chand Bahadur and others .. *Respondents.*

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Hindu Law—Will—Benefit under—Meaning of, within the rule in Barry v. Butlin *and* Tyrrel v. Painton—*Manager of testator's estate for life with a salary—Appointment of a person as—Provision in will for—If a benefit—Person receiving such a benefit taking active part in its preparation—Onus of proof on—Probate of will—Portion of will introduced without knowledge and approval of testator—Probate of will except as to that portion—Grant of.*

Where the High Court held that the "benefit" contemplated by the rule in *Barry* v *Butlin*, (1838) 2 Moo. P.C. 480 and *Tyrrell* v. *Painton*, (1894) P. 151, was "a pecuniary benefit, a legacy, for instance, more or less of a substantial nature," *held*, that the principle laid down in the said cases was not limited to such a benefit as that indicated by the High Court.

Where a will appointed a person manager of the testator's estate for life at a salary, *held* that that person received a benefit under the will within the rule in the abovementioned cases.

Where it appeared further that that person took an active part in the preparation of the will, *held* that the onus was on him of establishing that the testator knew and approved of the said provision in his favour.

Where it is found that, in a will otherwise validly executed, a part was introduced without the knowledge and approval of the testator, probate will be granted of all the provisions in the will except the part so introduced.

Rhodes v. *Rhodes* [(1882) L.R. 7 A.C. 192] followed.

Consolidated Appeals No. 21 of 1927 from two judgments of the High Court, Patna (Das and Foster, JJ.), dated the 9th December, 1925, reversing a judgment, dated the 23rd June, 1924, of the District Judge of Bhagalpur, and granting to the respondents probate of the last will, dated the 24th July, 1923, of one Babu Raghunandan Lal, who died on the 31st August, 1923.

The material facts of the case are set out in their Lordships' judgment and also in the report of the case in the Court below. See 95 I.C. 1036.

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* P.C. Appeal No. 21 of 1927. 30th November, 1928.

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De Gruyther, K.C. and *Wallach* for appellant.

Lowndes, K.C. and *Raikes* for respondents 1 to 4.

Archibald Pocock for Srimati Rajdulari Bibi (respondent).

30th November, 1928. Their Lordships' judgment was delivered by

SIR LANCELOT SANDERSON.—These are consolidated appeals by Sarat Kumari Bibi against two decrees of the High Court of Judicature at Patna, dated the 9th December, 1925, whereby the decree of the learned District Judge of Bhagalpur, dated the 23rd of June, 1924, was reversed.

The respondents, Rai Sakhi Chand Bahadur, Babu Ganesh Lal, Madusudan Das and Moulvi Jamaluddin Khan, who are four out of the five trustees named in the will purporting to have been made by one Raghunandan Lal on the 24th July, 1923, filed an application for probate on the 27th February, 1924, in the Court of the said District Judge of Bhagalpur.

Raghunandan died on the 31st August, 1923, leaving two daughters, Raj Kumari Bibi and Sarat Kumari Bibi.

His other near relations were his widowed sister Rajdulari Bibi and Krishna Bibi, the widow of Raghunandan's brother, Jadunandan Lal.

Caveats were filed by the two daughters and by Krishna Bibi; but objections were filed by Krishna Bibi and Sarat Kumari Bibi only.

In these appeals the Board is concerned only with the objections raised by the daughter, Sarat Kumari Bibi, who is the sole appellant.

At the hearing of the appeals before the Board the four above-named executors and Srimati Rajdulari Bibi, who is one of the respondents in the second appeal, appeared by learned Counsel. Krishna Bibi was not represented.

Three issues were framed by the learned District Judge as follows :—

1. Was the will validly executed and attested?

2. Was the testator in a sound disposing state of mind at the time of execution of the will?

3. Was the will executed under the undue influence of Moulvi Jamaluddin Khan?

The learned Judge answered the second issue in the affirmative and the third issue in the negative.

On the first issue he held that the will was not validly executed, and he answered the first portion of the issue, *viz.*,

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as regards execution, in the negative and the second portion, *viz.*, as regards attestation, in the affirmative.

The ground of his decision was that the propounders of the will had failed to satisfy him that the testator was aware of the contents of the will and that the will expressed his intention. He was of opinion that a very active part in the preparation of the will was taken by Jamaluddin, who was the manager and confidential servant of the testator, and that he took a substantial benefit under the will.

Applying the principles laid down in *Barry* v. *Butlin*[1] and *Tyrrell* v. *Painton*[2] the learned Judge held that the circumstances in connection with the preparation of the will aroused suspicion, that such suspicion had not been removed, and that he was not satisfied that the testator was aware of the contents of the will.

The learned Judge accordingly refused to grant probate of the will to the executors.

Rajdulari Bibi and the four above-named executors appealed in two separate appeals to the High Court of Judicature of Patna.

The learned Judges of the High Court on the 9th December, 1925, allowed the appeals, set aside the decree of the learned District Judge, and directed that probate should issue as prayed.

They held that the will created no trust in favour of Jamaluddin, that the learned District Judge was wrong in thinking that there was any suspicion inherent in the will which took the case out of the ordinary rule, *viz.*, that the proof of capacity and the fact of execution carry with them the presumption that the testator had knowledge of the terms of the will.

The learned Judges said that they were prepared to go further and hold that there was satisfactory evidence to satisfy the conscience of the Court that the testator had full knowledge of the terms of the will, including those contained in the 12th paragraph.

Sarat Kumari Bibi, a minor appearing through her guardian and next friend, Jugal Krishna Prasad, has appealed against the said decrees of the High Court to His Majesty the King in Council.

At the hearing before the Board it was admitted by learned Counsel appearing for the appellant that the will was undoubtedly executed by the testator, that it was duly attested and

1. (1838) 2 Moo. P.C. 480. 2. (1894) P. 151.

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registered, and that now there was no suggestion of undue influence.

The argument presented on behalf of the appellant was that the view of the High Court in regard to the benefit alleged to be conferred on Jamaluddin under the will was not sound, and that the conclusion of the learned District Judge in holding that it had not been satisfactorily proved that the testator was aware of the contents of the will, was correct. It was further contended that in any case there was no reliable evidence that the testator was aware of the provisions contained in the 12th paragraph of the will, and that the probate, if granted, should be granted excepting the said 12th paragraph.

The main provisions of the will are that the two daughters are given legacies of five hundred rupees monthly each, which will descend as far as their children's children. The testator's sister is given five hundred rupees monthly and the testator's residential house and furniture. Three hundred rupees monthly is given to an aunt of the testator Rama Bibi, two hundred monthly to Masudan Das, a second cousin, and after one or two other smaller legacies the balance is to go in the first instance to the improvement of the estate and, secondly, to the constitution of a Poor Students' Fund.

The 12th paragraph of the will is as follows:

XII For carrying out the above-mentioned provisions, I, the executant, appoint five trustees: (1) Rai Bahadur Babu Sakhi Chand, Superintendent of Police, at present manager of the Jagannath Temple, residing at Puri; (2) Rai Bahadur Surja Prasad, son of Babu Ras Bihari Sahay, deceased, Vakil, resident of Mahalla Khanjapur, district Bhagalpur; (3) Babu Ganesh Lal, my Khalera brother-in-law (cousin-in-law), resident of Mahalla Guzri, Patna City; (4) Babu Masudan Das, son of Babu Ram Narayan Das, deceased, (who is) my relative, resident of Mahalla Golaghat, Bhagalpur, and proprietor of the Gopal Steam Press, Bhagalpur; (5) Maulvi Jamaluddin Khan, the present manager of my estate, resident of Mahalla Imamnagar, district of Bhagalpur. The said Maulvi has up to this time been serving me faithfully and conscientiously and he is acquainted with everything. He is therefore assigned the position of manager for life in addition to that of a trustee. His monthly salary for manager's work is fixed at Rs. 250. Over and above this salary, proper conveyance charges shall be given to him, and travelling and daily diet expenses shall be given as in my time, or the trustees may make proper arrangement therefor in such manner as they may think proper. In (case of) increase of the income of the estate, the trustees shall allow him such increment of salary as may be decided upon by them. This item of expenditure shall be a charge on my estate under the head—establishment charges. Travelling expenses both ways, etc., shall be paid to trustees Nos. 1 and 3 when they shall come over on business of the estate, and the same rule shall apply to the trustees living at a distance. This (item of) expenditure shall be a charge on my estate under the head—allowance to trustees.

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The will purported to have been signed by the testator in the presence of Sarja Prasad and Satish Chandra Dey, and to have been acknowledged by the testator to Gauri Shankar Sahay. A note at the foot of the will is as follows:—"I certify that I have read over and explained this will to the testator, who seemed to understand it perfectly," and it is signed by Jamal Khan, *i.e.*, Jamaluddin. The will is signed in another place by Jamaluddin as the scribe of the document.

On the 24th of July, 1923, the will was presented at the Sadar Registration Office, Bhagalpur, by Raghunandan, the testator, who was identified by Sarja Prasad.

In dealing with the rule laid down by the above-mentioned cases, viz., *Barry* v. *Butlin*[1] and *Tyrrell* v. *Painton*[2] and the question whether Jamaluddin took a benefit under the will, the learned Judges of the High Court held that "the benefit must be a pecuniary benefit, a legacy, for instance, more or less of a substantial nature."

Their Lordships are not able to agree that the principle laid down in the above-mentioned cases is limited to such a benefit as that indicated by the learned Judges of the High Court.

Their Lordships are relieved from the necessity of discussing this matter at any length, for it was not seriously argued before them by learned Counsel for the executors that Jamaluddin did not receive a benefit under the will in view of the fact that the testator had thereby appointed him manager of his estate for the period of his life at a monthly salary of Rs. 250.

Their Lordships agree with the finding of the learned District Judge, which was to the effect that the undisputed facts of the case show that Jamaluddin took an active part in the preparation of the will, and inasmuch as, in their opinion, Jamaluddin did take a benefit under the will by reason of the provision in the 12th paragraph of the will, by which he was appointed manager of the estate for life at a salary, the principle laid down by the above-mentioned cases is applicable to this case, and these appeals must be decided in accordance therewith.

It will be sufficient to refer to the statements of the rule made by Lindley and Davey, L.JJ., in *Tyrrell* v. *Painton*[2]:

The rule in *Barry* v *Butlin*,[1] *Fulton* v. *Andrew*[3] and *Brown* v *Fisher*[4] is not, in my opinion, confined to the single case in which a will is prepared

1. (1838) 2 Moo. P.C. 480.
2. (1894) P. 151 at 157 and 159
3. (1875) L.R. 7 H.L. 448: 23 W.R. 566.
4. (1890) 63 L.T. 465.

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by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will. . . . (Lindley, L.J.).

* * * *

It must not be supposed that the principle in *Barry* v. *Butlin*[1] is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things which raises a suspicion; but the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed. . . . (Davey, L.J.).

The material facts relating to the preparation and execution of the will are as follows:—

In July, 1923, the testator was ill; he had been an invalid for a considerable time, and he left his home in Bhagalpur on the 25th July, 1923, and went to Calcutta for treatment. As already stated, he died on the 31st August, 1923. It was alleged by Jamaluddin that a few days before the testator went to Calcutta he handed to Jamaluddin two or three pages of notes, written in Urdu by the hand of one Hasan Ali, who has acted as tutor to the testator when he was a boy, and that the testator instructed him to take the notes to a vakil, named Ranjit Sinha, for the purpose of having them put into the form of a will.

Accordingly, on the evening of July 21, 1923, Jamaluddin took the notes to Ranjit Sinha, who dictated a draft of a will, which Jamaluddin wrote in Urdu.

On the morning of the 22nd July, 1923, Jamaluddin is alleged to have taken the draft of the will to the testator, and at his request to have read it to the testator, who asked him to read some parts again and to explain them. This he did, and he then handed both documents to the testator. It was alleged by Jamaluddin that the provision appointing him manager for life at a salary was in the notes given to him by the testator and in the draft will dictated by Ranjit Sinha.

Unfortunately, neither of these documents has been produced and Ranjit Sinha was not called as a witness. The explanation for the absence of the latter from the witness-box was

1. (1838) 2 Moo. P.C. 480.

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that he was appearing as vakil for the executors at the hearing of this case before the learned District Judge.

Hasan Ali, the tutor, gave evidence and said that he wrote the notes at the dictation of the testator, who kept what he had written. When cross-examined, he stated "that it was in the notes that Jamal would be a life manager on Rs. 250."

On the next day, *viz.*, the 23rd July, according to the evidence of Jamaluddin, the testator gave the draft to him, saying "There are some cancellations in it: copy it out again." It appears, however, from a later passage in his evidence that Jamaluddin made the cancellations in the draft at the order of the testator.

Jamaluddin made a fair copy of the draft, but he omitted from the fair copy the paragraph relating to the appointment of trustees and to the appointment of Jamaluddin as manager of the estate for life. He alleged that he was told by the testator to omit that paragraph from the fair copy.

The explanation given for the omission was that the testator wished Surja Prasad, the Government Pleader at Bhagalpur, to be one of the trustees of the will, that he wished to consult Surja Prasad as to the will, and the testator feared that if Surja Prasad saw his name as trustee and executor he might refuse to give his advice.

That evening Surja Prasad went to the testator's house, and the testator asked Jamaluddin to produce the fair copy of the will which he had made that day.

Accordingly, Jamaluddin brought it and in the presence of the testator read it out.

The testator asked Surja Prasad to see that it was all right. Surja Prasad said he would see it next morning, whereupon the testator told Surja Prasad to take the draft away with him, and that he would send Jamaluddin in the morning. The next morning, *i.e.*, on the 24th July, 1923, Jamaluddin went to the house of Surja Prasad, who suggested two alterations in the draft, *viz.*, that the Rs. 500 monthly to the daughters should be made an absolute estate of inheritance and that the grant for educational purposes should be specified. Jamaluddin, in reply to such suggestions, said that it was the testator's wish that the disposition should be as in the draft. Accordingly Surja Prasad did no more than make some verbal alterations and gave the draft back to Jamaluddin. The draft shown to Surja Prasad has not been produced, but there is no doubt that it did not

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contain the paragraph numbered 12 in the will relating to the appointment of trustees and manager.

Jamaluddin took the draft back to the testator, who instructed him to make a fair copy and to add the paragraph as to the appointment of trustees and manager.

There is no direct evidence that Jamaluddin reported to the testator the advice which Surja Prasad had given in respect of the two matters already referred to. It appears that Jamaluddin took upon himself to reject Surja Prasad's suggestions, relying on his own alleged knowledge of the testator's wishes.

Jamaluddin then made a final fair copy, including paragraph 12, and took it to the testator, read it out to him, and added and signed the certificate that he had read over and explained the will to the testator, who appeared to understand it perfectly.

In the afternoon of the same day Jamaluddin and Satish Babu went with the testator in a car to the Court. Surja Prasad was called, and the testator, sitting in the car, executed the will, signing his name on each page; this was done in the presence of Surja Prasad, Satish Babu and Jamaluddin.

Gouri Babu was then called, and the testator admitted his signature to him.

The will was then placed in an envelope, which was sealed. The testator, Surja Prasad and Jamaluddin went to the Registry Office, where the will was deposited.

Surja Prasad in his evidence said that he was aware—

"That a man who takes substantial benefits under a will should not take part in its preparation, but I did not know until next day at the registration that Jamal took a benefit under it. That clause was not in the draft."

In another part of his evidence Surja Prasad said:

"I intend to renounce my executorship. It was after the registration that Jamal Babu told me I was down as a trustee and executor. I said that I ought to have been consulted first, and that I objected, since I was about to retire from my practice. No executor or trustee was in the draft shown to me."

From the above-mentioned evidence it is not clear whether the information given by Jamaluddin to Surja Prasad as to the former taking a benefit under the will, and the latter being a trustee, was given in the presence of the testator.

It is possible that it was; on the other hand, it is equally possible that it was not, and to assume that the information

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was given in the presence of the testator would be mere guess-work.

Surja Prasad did, in fact, refuse to act as trustee and executor.

In view of the above-mentioned facts, in their Lordships' opinion there is ground for suspicion that the testator was not aware of the provision in clause 12 of the will by which Jamal-uddin was appointed manager of the estate for life at the salary of Rs. 250 per month, with the accompanying provisions for the payment of charges and expenses and the possible increase of salary.

Indeed, it was not seriously argued by the learned Counsel for the executors that there was no ground for suspicion. The point on which the learned Counsel laid stress was that the evidence was amply sufficient to remove the suspicion and to satisfy the Board that the testator was aware of and under-stood all the provisions, including paragraph 12, of the will.

The learned Counsel for the executors further argued that in any event probate should be granted of all the provisions in the will except that part of it which provided for the manager-ship of Jamaluddin, and he relied on the decision in *Rhodes* v. *Rhodes.*[5]

In their Lordships' opinion there is no ground for holding that the testator was not aware and did not approve of all the provisions of the will with the exception of paragraph 12.

The question, therefore, is narrowed down to the considera-tion whether the testator approved and was aware of the provi-sions of paragraph 12. Their Lordships are satisfied that that part of the paragraph which deals with the appointment of the five trustees was in accordance with the testator's wishes. They are not, however, satisfied that the appointment of Jamaluddin as manager of the estate for life and the terms of such appoint-ment were in accordance with his wishes or that he was aware of the provision in the will relating thereto.

It is not necessary for their Lordships to set out in detail all the reasons for holding that the suspicion in respect of the above-mentioned provision has not been removed. It will be sufficient to refer to some of them.

The evidence as to the existence of the above-mentioned provision in any of the drafts made prior to the fair copy of the

5. (1882) L.R. 7 A.C. 192.

will, which was executed, is limited to the evidence of Jamaluddin and Hasan Ali, who was speaking merely from his recollection.

None of the material notes or drafts was produced.

Ranjit Sinha, whose evidence would have been very important, was not called as a witness.

There is no evidence beyond that of Jamaluddin, the interested party, that on the morning of the 24th July, 1923, the will was read to the testator or that he read it himself.

There is no doubt that when the draft of the will was shown to Surja Prasad it did not contain paragraph 12 or any such provision.

The explanation given in the evidence of Jamaluddin for its omission was to the effect that the testator did not wish Surja Prasad to know that he was to be a trustee.

It is difficult to accept this as a sufficient and reasonable ground for withholding the provisions of that paragraph from the knowledge of Surja Prasad.

The position, therefore, in respect of this part of the case is that the clause in the will under which Jamaluddin was to receive a substantial benefit was by his action withheld from the knowledge of Surja Prasad, the Government Pleader, whose advice was sought as to the will, and no satisfactory explanation is forthcoming for such action.

There are some grounds to support the opinion of the learned District Judge that it was at least doubtful whether the testator could have read the Urdu script in which the will was written.

It is curious that Jamaluddin should have endorsed on the will the certificate that he had read it over and explained it to the testator, who seemed to understand it perfectly, if it were the fact, as alleged by Jamaluddin, that the testator could read the Urdu script and that he had, in fact, read the will for himself.

The above are some of the reasons which have actuated their Lordships in coming to the conclusion that the evidence is not sufficient to remove the suspicion attaching to the provision in question, and to satisfy them that the testator knew and approved of the said provision.

The result of their Lordships' conclusions is that probate should not be granted of that part of paragraph 12 which confers the benefit upon Jamaluddin; in other words, probate should not be granted in respect of that part of the paragraph which

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begins with the words "The said Maulvi has up to this time," and ends with the words "this item shall be a charge on my estate under the head—establishment charges."

This decision, however, does not mean that probate should be refused in respect of the remainder of the will. See *Rhodes* v. *Rhodes.*[5]

Their Lordships, therefore, are of opinion that the decrees of the High Court should be set aside and an order should be made that probate should issue in respect of the will with the exception of that part of paragraph 12 which has been heretofore specifically mentioned.

There remains the question of costs.

The appellant, Sarat Kumari Bibi, has succeeded in the appeal to His Majesty in Council, but to a limited extent only. She has been contending all through the proceedings that probate in respect of all the provisions of the will should be refused and that there should be an intestacy. In this contention she has failed.

On the other hand, the executors have been contending all through the proceedings for probate in respect of all the provisions of the will. In this contention they have failed.

Their Lordships, therefore, are of opinion that there should be no order for costs as between the appellant and the executors in any of the proceedings, and that any costs paid under any orders of the Courts below ought to be returned, but that the executors should be at liberty to get their taxed costs out of the estate.

The position adopted by Rajdulari before the Board was that probate should be granted in the form and to the extent hereinbefore indicated. Consequently their Lordships are of opinion that the appellant should pay the costs incurred by Rajdulari in the High Court and in the proceedings before the Board.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman, Walker & Shephard.*

Solicitors for respondents 1 to 4 : *Watkins & Hunter.*

Solicitor for respondent Rajdulari Bibi: *G. L. Borradile.*

K.J.R. *Appeal allowed.*

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5. (1882) L.R. 7 A.C. 192.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE REILLY.

B. M. S. R. M. Ramaswami Chettiar .. *Petitioner**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

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Ramaswami Chettiar *v.* Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), Ss 22 (4) and 23 (2) and (4)—Submission of return by assessee—Notice under S. 23 (2)—Compliance with notice—Subsequent notice under S 22 (4)—Failure of assessee to comply with this notice—Arbitrary assessment under S. 23 (4)—Jurisdiction of Income-tax Officer.

Where an assessee has made a return of his income and has complied with the terms of the notice issued to him under S. 23 (2) of the Indian Income-tax Act, there is jurisdiction in the Income-tax Officer to revert to S 22 (4) of the Act and make an assessment under S. 23 (4) for non-compliance with the notice under S. 22 (4).

In the matter of Messrs Harmukhrai Pulichand, (1928) 32 C.W.N. 710 (F.B.), *Ram Khelawan Ugam Lal* v. *Commissioner of Income-tax, Bihar and Orissa,* A.I.R. 1928 Pat. 529 (F.B.) and *In the matter of Chandra Sen Jaini,* (1928) I.L.R. 50 All. 589 followed.

Khushi Ram Karam Chand v. *Commissioner of Income-tax, Punjab,* A.I.R. 1928 Lah. 219 not followed.

Ramaswamiah v. *Commissioner of Income-tax, Madras,* (1925) I.L.R. 49 Mad. 831 (F.B.) distinguished.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

The petitioner is a resident of Karaikudi within the jurisdiction of the Income-tax Officer, First Circle, Karaikudi. He is the proprietor of a banking business at Kiddah and is also a partner in another banking business at Tapah, both situate in the Federated Malay States.

For the assessment of the year 1926-27 (based on the income of the Tamil year Krodhana) the petitioner returned an income of Rs. 125 from property and stated that he had received a remittance of Rs. 4,050 from his Kiddah business. He added that

*O.P. Nos. 188, 186 and 187 of 1928. 5th November, 1928

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there were no profits in that business and that the remittance received by him was from his capital there.

By a notice issued under section 23 (2) of the Income-tax Act, the Income-tax Officer called on the petitioner to adduce evidence in support of his return. The petitioner produced some of the extracts of accounts received from his Kiddah business, but not all, *i.e.*, the extracts up to Karthigai, Krodhana (November, 1925) in respect of one agency and all the extracts in respect of the other.

During the year of account the petitioner maintained two sets of books for his Kiddah business, one for the agency of Sathappan which ended in about Thai of the year of account and the other for the subsequent agency which began from Avani, Krodhana (August, 1925), *i.e.*, in the middle of the year of account. According to the accounts produced a profit of $77.818 accrued to the petitioner in Sathappan's agency. The old agency--Sathappan's agency—ended in Thai, Krodhana (February, 1926); but the accounts produced stopped with Karthigai, Krodhana and it was evident from the extracts produced that the accounts had not been finally closed by that date. For instance, there was a cash balance of $29.363 in the old agency accounts which had not been brought forward in the new agency accounts or otherwise accounted for. Further, a sum of $41.000 was found debited to the personal accounts of the petitioner, *i.e.*, withdrawn by him from the Kiddah business for investment elsewhere.

The evidence produced by the petitioner was therefore in the opinion of the Income-tax Officer insufficient to prove the amount of his income. He, therefore, issued a notice under section 22 (4) calling for the complete accounts of the closed agency at Kiddah and also for documents to prove that the money withdrawn from the Kiddah business did not represent profits received in British India. The date fixed for the compliance with this notice was 3rd July, 1926 and the notice was served on the petitioner's undivided son, who assists him in the business and was formerly himself the petitioner's agent at Kiddah. On 3rd July the petitioner's clerk appeared without the accounts specified. He offered to get certain "extracts" from the day books maintained at Kiddah if two months' time was allowed. The Income-tax Officer had reason to believe that the accounts called for could have been produced if the petitioner had so desired. He, therefore, held that the petitioner failed to comply with the terms of the notice issued under section 22 (4) and made an assessment under S. 23 (4).

The petitioner applied to the Income-tax Officer to re-open the assessment under section 27, but without success. A copy of the Officer's order is filed, marked Exhibit A.

The petitioner appealed to the Assistant Commissioner against the order of the Income-tax Officer with a like result. A copv of the Assistant Commissioner's order is filed, marked Exhibit B.

The petitioner then filed a petition before me under section 66 (2) of the Income-tax Act and required me to state a case and refer certain questions for the decision of the High Court. I declined to do so on the ground that no question of law arose for decision, except the one that I have been directed to refer in the High Court's order quoted above. This question had already been referred to the High Court in the case of *P. Thiruvengada Mudaliar* (Ref. Case No. 3 of 1927) and I undertook to give the petitioner any relief to which he might be entitled as a result of the decision on that question. A copy of my order is enclosed, marked Exhibit C.

The petitioner thereupon moved the High Court under Section 66 (3) of the Income-tax Act and in its order dated 9th December 1927 the High Court had directed me to state a case and refer the following question : [redacted]

"The applicant having made a return of [redacted] income and having complied with the terms of the notice issued to him under section 23 (2), was there any jurisdiction in the Income-tax Officer to revert to section 22 (4) and make an assessment under Section 23 (4) for non-compliance with the notice under section 22 (4)."

The contention underlying this question appears to be two-fold. It is suggested, in the first place, that when once a return of income has been made an Income-tax Officer's power to issue a notice under sub-section (4) of section 22 calling for accounts or documents is at an end ; and, secondly, that even if the issue of such a notice after the receipt of a return is legal, the person who fails to comply with the terms of the notice so issued may not on this ground be assessed under sub-section (4) of section 23 and deprived of his right of appeal.

Little need be said regarding the first branch of this argument. The language of sub-section (4) of section 22 is unambiguous. Only one condition is there imposed on the Officer's power to issue the notice and that condition is that the person to whom it is issued must be either a company or a person upon whom a notice under sub-section (2) of this section has been served. It is clear that, if the legislature had intended to impose other conditions, it would have stated these in sub-section itself, and would not have left them to be inferred from words used in a different section altogether, or from the mere order of sequence of the sections. If, however, evidence regarding the intention of the legislature is to be looked for outside the Act, it will be found in the report of

the All-India Income-tax Committee of 1922 which says in paragraph 34: "We agree . . . . that a Collector" (now an Income-tax Officer) "should have power to call for the production of accounts whether a return has or has not been filed"; or in paragraph 14 of the Statement of Objects and Reasons appended to the Bill of 1922 : "The Bill provides that the assessor" (now Income-tax Officer) "may call for accounts whenever he considers it necessary".

The second branch of the argument is based on the language of sub-section (4) of sec. 23. That sub-section runs as follows:—

> "If the principal officer of any Company or any other person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment".

It is suggested that if the words "having made a return" are not mere [redacted] meaning of the latter part of this sub-section [redacted]

> "If a person, not having made a return, fails to comply with all the terms of a notice issued under sub-section (4) of section 22 or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment".

Thus the words "having made a return" have to be read into the sub-section in order that it may bear the meaning attributed to it by the petitioner.

I submit that if the words "having made a return" necessarily imply an antithesis to something not expressed in the Act, the antithesis is between what may occur when a man has made a return and what may occur whether he has made a return or not; and that it would be more consistent with the other provisions of the Act to insert these words ("whether he has made a return or not") if any are to be inserted at all.

I submit, further, that if in construing this sub-section it is necessary to choose between treating certain words as superfluous and importing words into the statute, the former method is the less open to objection ; and it is my considered opinion that, in this instance, the intention of the legislature could have been adequately expressed if the words "having made a return fails to comply with all the terms of a notice issued" had not been enacted. The words "having made a return" appear to have been carried over without sufficient consideration from sub-section (4) of section 18 of the Income-tax Act (VII of 1918), where they are used with more point, since there was no provision in that Act corresponding

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to section 22 (4) of the present Act. In both Acts these words appear to be more or less superfluous, but their presence can perhaps be justified on the view that they were inserted *pro majore cautela* to emphasise the fact that, even when the party, by submitting a return, has avoided one of the defaults specified in the sub-section, he may still commit another, and thereby incur the same penalty by subsequent failure to comply with a notice under section 23 (2).

In my opinion, therefore, the Income-tax Officer was entitled to issue a notice under sub-section (4) of section 22 in this case and to assess under sub-section (4) of section 23 for failure to comply with that notice.

K. S. Krishnaswami Aiyangar and *R. Kesava Aiyangar* for petitioner.

M. Patanjali Sastri for respondent.

The judgment of the Court was delivered by

Reilly, J.

Reilly, J.—In this case an Income-tax assessee made a return of his income when required to do so under S. 22 [redacted] of the Indian Income-tax Act, 1922. Not being satisfied [redacted] the return the Income-tax Officer required the assessee under S. 23 (2) of the Act to produce evidence in support of his return. The assessee produced some evidence; but the Income-tax Officer found it insufficient to show the amount of the assessee's income and then issued a notice to him under S. 22 (4) of the Act to produce complete accounts of a branch business at a place in the Federated Malay States for the account year in question. Those accounts the assessee did not produce, and the Income-tax Officer, therefore, proceeded to make his assessment under S. 23 (4) of the Act—that is an assessment not made upon evidence but "to the best of his judgment," an assessment from which under the Act the assessee had no right of appeal. The question referred to us is "the applicant having made a return of his income and having complied with the terms of the notice issued by him under section 23 (2), was there any jurisdiction in the Income-tax Officer to revert to section 22 (4) and make an assessment under section 23 (4) for non-compliance with the notice under section 22 (4)"? The assessee contends that in those circumstances the Income-tax Officer had no power to make an arbitrary assessment under S. 23 (4), from which there was no right of appeal.

This question has been before four of the Indian High Courts. It has been answered against the assessee by a unanimous Full Bench of three Judges of the Calcutta High Court

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in *In the matter of Messrs. Harmukhrai Pulichand,*[1] by a unanimous Full Bench of five Judges of the Patna High Court in *Ram Khelawan Ugam Lal* v. *Commissioner of Income-tax, Bihar and Orissa,*[2] overruling *Brij Raj Rang Lal* v. *Commissioner of Income-tax, Bihar and Orissa,*[3] a decision of two Judges, and by a Division Bench of the Allahabad High Court in *In the matter of Chandra Sen Jaini.*[4] Now that the earlier decision of the Division Bench of the Patna High Court has been overruled, there remains in the assessee's favour of the cases quoted before us only a decision of a Division Bench of the Lahore High Court in *Khushi Ram Karam Chand* v. *Commissioner of Income-tax, Punjab.*[5] At one stage of the arguments before us it was suggested that the decision of a Full Bench of this Court in *Ramaswamiah* v. *Commissioner of Income-tax, Madras*[6] was by implication in favour of the assessee in this matter; but on examination it will be seen that it was found in that case that the assessment was in fact made, not under section 23 (4) but under [illegible]ion 23 (3). The weight of authority on the question before [illegible] therefore overwhelmingly against the assessee.

It was first contended by Mr. Krishnaswami Aiyangar for the assessee that the Income-tax Officer's power to call for accounts under section 22 (4) can be exercised only before the assessee has submitted a return of his income. There is nothing whatever in the wording of the sub-section to suggest that. On the contrary the only limitations on the power of the Income-tax Officer to call for accounts in that sub-section are that, if the assessee is not a company, a notice requiring him to make a return of his income must have been served on him and that accounts for a period more than three years prior to the previous year cannot be called for. The fact that those restrictions are mentioned explicitly makes it the more improbable that any other restriction is implied. It is urged that the fact that the sub-section occurs in section 22, which deals with the procedure for getting in a return, makes it probable that all its provisions apply to the stage before the return comes in. That would be a very unsafe reason for limiting the plain effect of the words of the sub-section; and it may be remarked that sub-section (3) of section 22 enables the assessee to do something after he has submitted his return. If section 22 (4) is to be construed as

1 (1928) 32 C.W.N. 710 (F.B.).
2. A.I.R. 1928 Pat. 529 (F.B). 3. A.I.R. 1927 Pat 390.
4. (1928) I.L.R. 50 A. 589. 5. A.I.R. 1928 Lah. 219.
6. (1925) I.L.R. 49 M. 831 (F.B.).

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viously be used in a very oppressive way. For instance, the Income-tax Officer might call for some evidence of doubtful relevance and difficult or impossible to produce, and, if it were not produced, enforce the penalty of arbitrary assessment. That would be clearly unjust, and the Legislature has rightly made the penalty of arbitrary assessment inapplicable to such a case. But, if an assessee fails to produce at any stage when required his accounts—the most important of all evidence in such a matter, the very evidence on which, if he is honest, he will himself wish to reply—why should he be treated more leniently when his improper and obstructive refusal comes after instead of before he submits his return?

No reason has been suggested for such a distinction. On the contrary, the man who refuses to produce his accounts when the Income-tax Officer has expressed under section 23 (2) dissatisfaction with his return is clearly more blameworthy and obstructive than the man who fails to produce them before he has made his return, when no one has yet expressed an opinion whether his return will be an honest one or not. When once it is admitted that the Income-tax Officer must have power to call for accounts in the course of the inquiry under section 23 (3)—and without it the inquiry might easily be reduced by the assessee to a farce—the omission to penalise failure to comply with the Officer's requisition under that sub-section by arbitrary assessment is strong evidence that the right for accounts even at that stage must be found elsewhere, that is in S. 22 (4).

There remains the actual wording of section 23 (4) which sets out the failure on the part of the assessee which entail the penalty of arbitrary assessment without appeal. It is contended that, even if section 22 (4) gives power to call for accounts after the assessee has submitted his return, the penalty of arbitrary assessment is restricted to a failure to produce accounts when called for before the return is submitted. As I have indicated, there is nothing in the object or nature of the proceedings and nothing in section 22 or the rest of section 23 to make it probable that the legislature would intend to treat more leniently a failure to produce accounts when required after the submission of a return than before it. But it is contended that the wording of section 23 (4) has that surprising result. It is quite clear, that, if a company or other assessee fails to submit a return by the proper date, the penalty of arbitrary assessment is to be enforced. That is what the sub-section first provides. Then it goes on to provide the same penalty for failure

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to comply with all the terms of a notice issued under sub-section (4) of section 22. If the notice under section 22 (4) can be issued at any time—and that I do not think can now be doubted—there is nothing so far to suggest that the penalty is attached only to failure to comply with a notice issued under section 22 (4) before a return is submitted. But section 23 (4) goes on to provide that, if a company or other assessee "having made a return" fails to comply with all the terms of a notice issued under section 23 (2) the penalty shall apply. The contention of the assessee in this case rests upon the insertion of the words "having made a return." It is urged with truth that failure to comply with a notice under section 23 (2) can occur only after making a return as that notice cannot be issued before a return is made. Therefore it is contended these otherwise useless words must have been introduced to show by contrast that the other two failures penalised must occur before a return is made. No such contrast could be of any use in regard to the first failure mentioned in the sub-section, which is failure to make a return at all. Then this supposed contrast, if it indicates anything, must be understood to indicate that the failure to comply with a notice to produce accounts under section 22 (4) is to be penalised only if the notice is issued before the return is submitted. But, if that was the intention, if the object was to express something of such importance, why try to indicate it in a clumsy and obscure way? We must all accept the principle adopted in *Khushi Ram Karam Chand* v. *Commissioner of Income-tax, Punjab*[5] that if two constructions of a fiscal enactment are equally possible and reasonable, the construction more favourable to the subject must be enforced. But the contention of the assessee in this case rests on too frail a foundation. The words "having made a return" in section 23 (4) may be superfluous and add nothing necessary for the description of the third failure penalised, but they are applicable to that failure. Their use may be tautological and inartistic. But because they are unnecessary, we are not justified in jumping to the conclusion that they have been used to express something which it cannot be pretended they could express clearly, which a child could express clearly in other words, which no man of education and sense of responsibility would think of expressing in that way and of which there is no indication in section 22 or other parts of section 23.

5. A.I.R. 1928 Lah. 219.

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That to my mind would not be choosing between two equally possible and reasonable constructions, but adopting a strained construction, unreasonable in effect and out of tune with the policy of the Act that an assessee should make full disclosure of his income. In my opinion the power to call for accounts under section 22 (4) may be exercised by the Income-tax Officer after the assessee has submitted a return, and failure of the assessee to produce his accounts when called for after he has submitted a return may be penalised by arbitrary assessment under S. 23 (4). The question referred to us must be answered in the affirmative, and the assessee should pay the costs of the reference Rs. 250.

N.S. *Reference answered against the assessee.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE REILLY.

The Commissioner of Income-tax .. *Petitioner**

v.

M. V. Krishna Aiyar & Sons .. *Respondents.*

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The Commissioner of Income-tax v. Krishna Aiyar & Sons.

Income-tax Act (XI of 1922)—Rule 4 of rules under—Registry of partnership under—Partnership carried on by partners under deed of partnership for term which has expired—Right in case of—Contract Act, S. 256—Partnership for term continued after expiry of term—Contract during term and that after its expiry different—Contracts.

A contract for a term constituted by a written agreement comes to an end at the expiration of the period for which it was entered into; and the contract during the term differs from that which arises from the continuance of the relation by the mutual consensus of the parties after the term has expired. The new contract is none the less a new contract because it by implication contains within itself certain terms of the old written contract as it were re-enacted.

Clark v. *Leach,* (1863) 1 De G. J. and Sm. 409: 46 E.R. 163 and *Neilson* v. *Mossend Iron Co.,* (1886) 11 A.C. 298 followed.

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*O.P. No. 133 of 1928. 26th October, 1928.

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The Commissioner of Income-tax v. Krishna Aiyar & Sons.

There is nothing in the language of Section 256 of the Indian Contract Act which, in any way, modifies the effect of the above decisions of the House of Lords.

On 31st August, 1923 a partnership deed came into effect for a period of three years. The business was, however, continued after the expiry of the said period of three years by the partners as before On 26th July, 1927, the partners applied for the registration of the firm under Rule 4 of the rules framed under the Income-tax Act of 1922.

Held, that at the time when the application for registration was made there was no operative document to be registered and that the application had rightly been rejected.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

The applicants are a firm of silk merchants. They were called upon under section 22 (2) of the Act to make a return of their income of the previous year with a view to assessment in the year 1927-1928. They submitted the return on 26th July, 1927, and at the same time applied for registration under Rule 4 of the rules framed under the Act. In compliance with Rule 2 they produced partnership deeds, dated 3rd November, 1917 and 29th August, 1923. True copies of these deeds (Exhibits A and B) and English translations thereof (Exhibits A-1 and B-1) are appended to this reference. The Income-tax Officer found that the object of the later deed (Exhibit B) was to continue the partnership created in the earlier deed (Exhibit A) for a period of three years from 31st August, 1923; that this period had expired on or about 30th August, 1926 and that no further deed had been executed to prolong the life of the partnership beyond that date. In these circumstances he rejected the application and assessed the applicants as an unregistered firm. The applicants appealed unsuccessfully to the Assistant Commissioner, a copy of whose order is enclosed (Exhibit C).

The question arising in the case, on which the opinion of the Court is solicited, is whether the applicants were entitled to be registered by the Income-tax Officer under Rule 4 of the rules framed under the Act.

Sub-sec. (14) of S. 2 of the Act defines "registered firm" as a firm constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner. "Prescribed" according to sub-section (10) of the same section means "Prescribed by rules made under this Act." Rules 2 to 6 of the rules made under section 59 of the Act prescribe the manner in which the registration may be applied for and effected. According to rule 2 "any firm constituted under an

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instrument of partnership specifying the individual shares of the partners" may apply for registration. According to Rule 3 the application "shall be accompanied by the original instrument of partnership under which the firm is constituted together with a copy thereof."

The application under Rules 2 and 3 was made in this case on 26th July, 1927. The period of three years specified in the deed Exhibit B having expired nearly a year previously, I submit that the applicants were not, on 26th July, 1927, a firm constituted under an instrument of partnership and were not therefore competent under Rule 2 to apply for registration. I submit further that, since the deed produced was not one under which the firm was then constituted, the conditions of Rule 3 were not satisfied.

The applicants rely on section 256 of the Indian Contract Act, the effect of which, according to them, is that on 26th July, 1927, the deed Exhibit B was still in force although the period of three years mentioned in it had expired. That section runs as follows:

"If a partnership entered into for a fixed term be continued [redacted] term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner."

My opinion is that the applicants have mistaken the effect of this section. When a document creating a partnership of a specific period has ceased to have effect owing to the expiry of the period and no fresh document has been executed, the partnership may, no doubt continue, but it cannot be said to continue under the instrument. The continuance is a result of a new agreement which is not identical with that embodied in the instrument, although some of its terms are presumed to be in accordance therewith.

In my opinion, therefore, the Income-tax Officer's decision was correct and the question should be answered in the negative.

M. Patanjali Sastri for petitioner.

R. Rajagopala Aiyangar for respondent.

The Court delivered the following

JUDGMENT.—This is a reference put up by the Commissioner of Income-tax under section 66 of the Act. The question on which our opinion is asked is whether in such circumstances as this case discloses the assessees were entitled to be registered under Rule 4 of the rules framed under the Act. I will briefly summarise what the material circumstances are in this case. The original partnership was entered into by a deed on the 3rd November, 1927, the contracting parties being Venkatarama

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Aiyar & Sons of the one part and D. Krishnaswami Aiyangar of the other. The business they carried on was that of silk merchants and the term of the partnership deed was expressed to be for five years, so that it expired on the 3rd of November, 1922. On the 31st of August, 1923, a new partnership deed came into effect for a period of three years, so that it would expire on the 31st of August, 1926. In fact, the business was continued thereafter by the partners as before for aught we know down to this day. A return was called for by the income-tax authorities for the year April, 1926—April, 1927 for the purposes of assessment. That return was made and besides the return on the 26th of July, 1927, the assessees put in an application for registration of the firm. The Commissioner has refused to register the partnership for the purposes of the Act and the question is whether he was right. I will now shortly refer to the two or three material sections and rules of the Income-tax Act. By section 2 (14) "A 'registered firm' means a firm constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner" and the manner is prescribed in the rules. The material rule is Rule 2 which runs as follows:—"Any firm constituted under an instrument of partnership specifying the individual shares of the partners may, for the purposes of cl. 12 of section 2 of the Indian Income-tax Act, register with the Income-tax Officer particulars contained in the said instrument on application in this behalf made by the partners or any of them" and then follows a form which sets out the particulars which are to be given. This form was filled in and the application was accompanied by a copy of the instrument of partnership of the 31st of August, 1923. The Commissioner bases his refusal to register the particulars forwarded by the assessee firm on the ground that, when the application for registration was made the instrument of partnership had ceased to be operative, that the partnership was at that date being carried on under what must be regarded as a new agreement which, being verbal, could not be said to be an instrument of partnership within the meaning of the rules. The contention of the assessees is that the true view of the position was that the business was by verbal arrangement or tacit consent between the partners being carried on under the original instrument of 31st August, 1923, whose life had been prolonged and continued by the act of the parties. The dividing line no doubt is a very narrow one and language is used from time to time in the English authorities which speaks

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of a contract to renew by implication and it is said that that enabled the partnership whose life had been continuous since the deed of 1923 to have it registered as the document governing their relations throughout. In one sense there clearly was no new partnership here, in the sense, that is, that there was no change in the personnel and that the trading carried on was continuous without break from August, 1923. The real question we have to determine is whether in contemplation of law the original contract was actually continued in existence or whether the true view is that such of its terms as could be taken to govern the subsequent period could only do so on the footing that they were impliedly revived, in so far as they are applicable to the partnership at will, by the tacit verbal agreement which is to be regarded as arising from the continuance of the trade thereafter. We think that there are two decisions of the House of Lords which conclude this question in favour of the Crown. The first is a decision of Westbury, L.C., in *Clark* v. *Leach*.[1] At page 414 the Lord Chancellor says this:

"Ordinarily a contract for a term constituted by a written agreement must be considered as having come to an end at the expiration of the period for which it was entered into; and the contract during the term differs from that which arises from the continuance of the relation by the mutual consensus of the parties after the term has expired. The one is to last for a certain term; the other only for so long a time as they both shall choose. Am I then by any principle of law bound to assume or justified in assuming that all the special articles and conditions in the original written deed of partnership for a term are at once transferred by law to this new contract, which has no particular limit to the term of its duration? That would be a strong and extravagant assumption, and one that is not warranted by any principle or authority."

That passage appears to me to make it clear that Lord Westbury considered the contractual nexus of the parties after the expiry of the deed to rest upon the new implied oral agreement, and that the articles of the deed which are to be considered as preserved are preserved not by virtue of the original deed which had ceased to operate but of the new agreement. In the case of *Neilson* v. *Mossend Iron Co.*[2] Lord Selborne puts the matter thus:

"There is no doubt about the law that, when there is a partnership for a term of years, and it is afterwards, after the expiration of the term, continued at will, the rule in the absence of a contract to the contrary is that it may be presumed that the new business is carried on upon the

1. (1863) 1 De G J. & Sm. 409: 46 E. R. 163 at 165.
2. (1886) 11 A.C. 298.

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old terms as far as they are applicable to it, and only so far; and as far as the principle is concerned I do not think there is any discrepancy between any of the authorities. It is not at all necessary to examine into the particular cases in which it has been held that a particular term of a written contract did or did not go into the new and unwritten contract, because every case has turned upon its own particular circumstances and upon the question as applied to the words of the particular instrument, whether the old term was or was not applicable to the new contract."

Similar language is used by Lord Watson who speaks specifically at page 308 of a distinction between the "old" contract and the "new." And the new contract is none the less a new contract, we must take it, because it by implication contains within itself certain terms of the old written contract as it were re-enacted. These pronouncements of the highest tribunal do not turn on any special provision of any statute but are based on the general principles of the law of partnership and we should, we think, endeavour respectfully to follow those high authorities. I think that there is nothing in the language of section 256 of the Indian Contract Act which, in any way, modifies the effect of those decisions of the House of Lords. The result is that at the time that the assessees applied for registration there was no operative document to be registered.

Another short contention is raised and that is this. The year of assessment with which we are concerned is the year 1927-1928 and it is said that as that will be a return of trading profits for the year 1926-1927 registration ought not to have been refused as four months of that trading year were before the expiration of the deed of the 31st of August, 1923. We cannot accede to this contention. What we have to look to is the year of assessment; and had the application of the 31st of July, 1927, been granted, it would still in our opinion only apply to the financial year 1927-1928. On these grounds we think that the Commissioner was right in rejecting the application for registration and that we must so answer the questions submitted to us and order the assessee to pay the Government Rs. 250 as the costs of this reference.

My learned brothers have seen this judgment and agree with it.

A.S.V. *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

T. Sivasankaram Pillai and others .. *Petitioners** (*Accused Nos.* 1 *to* 5 *and* 7).

Siva-sankaram Pillai, *In re.*

Madras Local Boards Act (*XIV of* 1920), *S.* 16—*Transaction of business—Mode of—"Giving notice to the Local Board"—Meaning of—Tender of resignation by President sent to each member separately and received by him, but not considered at a meeting of the Board—Effect—Government order expressing the view that resignation took effect—If binding on the Court—Penal Code, S.* 21, *Illustration—Member of Taluk Board—Whether public servant—Prosecution of—Necessity for sanction—Criminal Procedure Code, S.* 197.

A Local Board is something other and more than the mere sum of its individual members. Such a body can transact business only at duly constituted meetings. The President of the Board can resign by "giving notice to the Local Board" under section 16 of the Madras Local Boards Act, but the act of receiving such notice is a business which should be transacted by the Board and consequently such receipt of notice can only take place at a duly constituted meeting of the Board.

Where the President of a Local Board sent to each member of the Board separately a tender of his resignation and the same was received by each member separately but was not considered at any duly constituted meeting of the Board,

Held, that, though acceptance of resignation was not necessary, the resignation did not take effect under section 16 of the Madras Local Boards Act as the action of the President in sending such notice did not amount to "giving notice to the Board" within the meaning of the section.

Held also, that the fact that the Government passed an order expressing the view that the resignation took effect as soon as the notice reached the members did not prevent the Court from coming to a contrary conclusion, since the Local Boards Act contained no provision empowering the Government to decide a question of such a character.

A member of a Taluk Board is a "public servant" within the meaning of section 21 of the Penal Code and consequently cannot be prosecuted without the sanction of the Government under section 197 of the Criminal Procedure Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Penukonda, in Calendar Case No. 62 of 1927.

V. L. Ethiraj and *S. Ranganatha Aiyar* for petitioners.

K. S. Vasudevan for *The Public Prosecutor* on behalf of the Crown.

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*Cr.R.C. No. 298 of 1928. 9th October, 1928.
Cr.R.P. No. 239 of 1928.

Siva-sankaram Pillai, *In re.*

The Court made the following

ORDER.—This case arises out of an occurrence which took place at a meeting of the Taluk Board of Penukonda held on the 24th August, 1927 and which resulted in the conviction of six persons by the Joint Magistrate of that place. The first petitioner, Mr. T. Sivasankaram Pillai, was a nominated member of the Taluk Board and had been elected President. Whether he was still President when the meeting in question was held is in dispute, but he took the Chair in that capacity. While the meeting was proceeding, one of the members, R. Siddanagoud, who was the complainant in the criminal case entered and took the attendance register for the purpose of signing it. The President told him not to do so, as he had disqualified himself as a member by failure to attend some previous meetings. As he persisted the President told another member, now the second petitioner, to take the book from him, and in so doing the second petitioner pushed the complainant so that the chair in which he was sitting was broken and he fell, sustaining some slight injuries. The President, after some further disorder, ordered some of the servants of the Board to evict the complainant from the meeting and they accordingly turned him out. Upon these incidents is founded the criminal case. The learned Joint Magistrate has found that Mr. Sivasankaram Pillai had ceased to be President at the time of the occurrence and that his action was therefore unauthorised. He has convicted him accordingly of abetment of voluntarily causing hurt and wrongful restraint, and sentenced him to pay a fine of Rs. 50. The second petitioner has been convicted of voluntarily causing hurt and sentenced to pay a fine of Rs. 25, while of the remaining four petitioners (Accused Nos. 3, 4, 5 and 7), who are Board servants, Accused Nos. 4 and 5 have been convicted under sections 352 and 341, Indian Penal Code and accused Nos. 3 and 7 under section 352, Indian Penal Code only. Each of these four persons has been fined the nominal sum of one anna.

The contention raised in this Criminal Revision Petition against these convictions is that the Joint Magistrate was in error in holding that Mr. Sivasankaram Pillai had ceased to be President at the time of the occurrence. If he was still President, two separate consequences, it is said, would follow. In the first place, his prosecution could not have been undertaken without the Local Government's sanction under section 197 of the Criminal Procedure Code, and, secondly, he would then have

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been acting within his rights in evicting the complainant. The facts upon which it was successfully contended in the Lower Court that he had ceased to be President are briefly these. It appears that the members of the Board had split into two parties, one supporting the President and the other hostile to him. On the 15th January, 1927, the Board by 10 votes to 8 passed a token resolution reducing the education budget by one rupee as a protest against the President's administration. In consequence of this, on the 16th February, the President sent to each member separately a tender of his resignation in the terms of Ex. II. The next meeting of the Board was fixed for the 25th February, and the subject of this resignation was put down on the agenda as resolution or item No. 92. At the meeting one of the members proposed that this item should be advanced in position and disposed of before the other intervening items, but the President disallowed the proposal for want of notice. Thereupon the opposite faction withdrew and held a separate meeting outside at which they passed a resolution accepting the resignation. A copy of their proceedings has been filed as Ex. V. Meanwhile and before the subject of his own resignation was reached, the President adjourned the meeting of the Board till 8 A.M. on the following day (the 26th) waited for half-an-hour, and there being no quorum within that time, further adjourned the remainder of the agenda, including the question of his own resignation. The members of the other faction, who had been waiting outside, then entered the room, appointed one of their number as President, and seemingly in derogation of their own previous action, again passed a resolution accepting the President's resignation. So far as the proceedings of the Board or of its members are concerned it may be said that matters stood thus at the time of the occurrence.

Section 16 of the Madras Local Boards Act enables a President to resign by "giving notice to the Local Board." The question accordingly is whether notice of resignation was so given. It is clear, I think, that a Local Board is something other and more than the mere sum of its individual members. Section 6 (3) of the Act declares it to be a body corporate with perpetual succession and a common seal and vests it with the capacity of suing or being sued in its corporate name. It would follow upon general principles and by analogy with other bodies corporate that such a body can transact business only at duly constituted meetings and that this is so is borne out by the provisions of the Act and the rules framed thereunder.

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Those rules are contained in Schedule II. Rules 1 and 2 lay down the circumstances in which meetings of the Board shall be held and Rule 3 provides that no meeting shall be held, except in cases of urgency, unless notice of the hour and the business to be transacted has been given seven days in advance. Rule 6 prohibits the transaction of any business at a meeting unless at least one-third of the number of members are present, and *a fortiori* no business can be transacted otherwise than at a meeting. There is, of course, no question but that any resolution of the Board passed in circumstances at variance with these and other rules would be invalid. Section 16, it is true, does not require that the resignation should be accepted, only that notice of it should be given to the Board. But it appears to me that the act of receiving such notice is as much business to be transacted by the Board in accordance with the rules framed for its meetings as any other of its activities, and consequently that such receipt could only take place at a duly constituted meeting. The notice circulated by Mr. Sivasankaram Pillai to the members on the 16th February was accordingly not a notice to the Local Board, and was not a notice received by the Local Board, and I cannot hold that by issuing it to each member and upon its receipt by each member his resignation of the office of President took effect. It needs no further discussion of the provisions of the Act to justify the conclusion that the two so-called meetings of the opposite faction on the 25th and 26th February were not properly constituted meetings of the Local Board, and that no steps taken at those meetings with regard to the resignation were valid. My conclusion accordingly is that the President did not give notice of his resignation to the Local Board and that he cannot be held to have resigned.

The learned Joint Magistrate has based his conclusion upon this point not upon the terms of the Act but upon a Government Order G.O. No. 2310, L. & M., dated 21st June, 1927 apparently passed after correspondence with the President and the dissentient members. It expresses the Government's view that the resignation communicated by Mr. Sivasankaram Pillai to all the Taluk Board members on the 16th February took effect as soon as the notice of the resignation reached the members, and it proceeds to direct him to hand over charge to the Vice-President. It will be seen that this does not amount to an order depriving the President of his office, whether or not it would be competent to the Government to pass such an

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order. I read it merely as an expression of opinion that the intimation given of his resignation by the President to the members amounted to notice to the Local Board under S. 16. Such an expression of opinion does not, of course, prevent a Court of law from coming to a contrary conclusion, since the Act contains no provision empowering the Government to decide a question of this character. The Joint Magistrate makes reference also to a suit (O.S. No. 12 of 1927) filed in the District Court of Anantapur to declare that the first petitioner had ceased to be President. After the learned District Judge had reached the conclusions at which I have myself arrived, and recorded them in a judgment, the plaintiffs, doubtless being aware of what the result would be, withdrew the suit. This circumstance does not, of course, in any way affect the issue before me.

On the finding that Mr. Sivasankaram Pillai was still President, it is clear that the sanction of the Local Government to his prosecution was necessary under section 197 of the [illegible] Procedure Code. One need look no further than to the illustration to section 21 of the Indian Penal Code for proof that a member of a Taluk Board is a public servant; and under S. 43 of the Local Boards Act the President of a Taluk Board can only be removed by the Local Government. Thus the prosecution of the first petitioner was irregular for want of sanction.

That does not of course dispose of the matter as against the other petitioners. If, however, the first petitioner was lawfully presiding at the meeting, it has not been contended before me that what he did or caused the other petitioners to do would in the circumstances have amounted to any offence. Under section 32 of the Act, the President is empowered to preserve order and the complainant seems deliberately to have flouted the first petitioner's authority on the ground that he was no longer President. If he sustained any slight injuries in so doing, they were of his own seeking.

I allow the Criminal Revision Petition, set aside the convictions, acquit the petitioners and direct that the fines, if paid, be refunded.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Y. Desi Chettiar .. *Petitioner** (*Petitioner in C.R.P. No. 697 of 1928 on the file of the High Court*)

v.

J. K. Chinnasami Chettiar, President, Union Board, Kaveripatnam. *Respondent* (*Respt. in do.*).

Desi Chettiar v. Chinnasami Chettiar.

Madras Local Boards Act—Election—Nomination of members for—Scrutiny of—Basis of—Electoral roll in existence at date fixed for nominations—Electoral roll prepared subsequently but published before day fixed for scrutiny of nominations—Scrutiny of nomination with reference to new roll and rejection of nomination because member's name is not in new roll—President's act of—Judicial or ministerial—Propriety of act—S. 54 of Local Boards Act—Court's power of interference with—Preparation of new electoral roll—Judicial or ministerial act—Court's power of interference with.

A notice was issued for the holding of an election of members for a Union Panchayat and a date was fixed for nominations. The petitioner was one of the persons who were nominated on the said date. Subsequently a new final electoral roll was published which omitted the petitioner's name. On the day fixed for the scrutiny of nominations the President scrutinised the nominations on the footing of the new electoral roll and rejected the petitioner's nomination as he was not on the roll. On an application by the petitioner for a writ of *certiorari* to prevent the election being held on the new roll, *held*

(1) that the act of the President in conducting the scrutiny of the nominations under the new electoral roll instead of under the old one was a purely ministerial act and was in no sense a judicial act, and that the High Court could not interfere with it by issuing a writ of *certiorari*; and

(2) that, even if the President's act were held to be a judicial act, it was strictly in accordance with the rules and could not be interfered with.

The preparation of a new electoral roll is a purely ministerial act, and ordinary Civil Courts have no control over the preparation of such roll, and the roll once published is final.

A new roll comes into force on the date of its publication, and the President's action in scrutinising the nominations with reference to that roll was in accordance with S. 54 of the Local Boards Act.

The compilation of a new electoral roll is merely a ministerial act and not a judicial one.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* staying the election proposed to be held by the

*C.M.P. No. 2207 of 1928. 14th August, 1928.

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him any right to obtain a writ. In the second place, these observations were directed to the consideration of the propriety of an injunction in a civil suit, a matter with which we are not here concerned. And finally it may be observed that these remarks were made some years ago when the practice of individuals coming forward to stop elections in order that their own individual interests may be safeguarded was not so common. It is clear that there is another side of the question to be considered, namely, the inconvenience to the public administration of having elections and the business of Local Boards held up while individuals prosecute their individual grievances. We understand the election for the elective seats in this Union has been held up since 31st May, because of this petition, the result being that the electors have been unable since then to have any representation on the Board, and the Board is functioning, if indeed it is functioning, with a mere nominated fraction of its total strength; and this state of affairs the petitioner proposes to have continued until his own personal grievance is satisfied.

For reasons given we hold that the petitioner is not entitled in law to a writ. The helpless position in which the petitioner complains that he now finds himself goes no way towards supplying the lack of legal sanction. We, therefore, see no reason to interfere and dismiss the petition with costs.

A.S.V. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.

Peddi Reddi Jogi Reddi .. *Appellant**

v.

Panem Chinnabbi Reddi and others .. *Respondents.*

P. C.

Peddi Reddi Jogi Reddi v. Chinnabbi Reddi.

Hindu Law—Joint family—Joint family property—Presumption—Onus of proof—Sister's husband, a Christian—Ancestral property of, inherited by his minor son—Enjoyment of, as family property of the brothers, the proceeds of all the properties and the acquisitions of individual members all going to a common fund—Purchase subsequent in nephew's name but out of the common fund of the undivided ancestral half-share of his paternal uncle's son—Right of members of joint family to property inherited by nephew and subsequently purchased in his name.

Plaintiff and his brothers formed a joint Hindu family. They had a sister who married a Christian After the marriage, the sister's husband

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*P.C. Appeal No 108 of 1926. 15th November, 1928.

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went to live in his wife's village. He died leaving the appellant, a minor about four years old, his son and sole heir to the property which he had inherited from his father. After his death mother and child (appellant) went to live with the child's uncles. From that time onwards the uncles treated the minor's property in the same way as their own family property; they cultivated it and treated the produce as joint property. The position remained unchanged even after the appellant attained his majority; individual members adventured, the proceeds going to a common fund. About five years after the appellant attained his majority, the half interest of his paternal uncle in the ancestral property was purchased from that uncle's son, the purchase price being paid for out of the common fund, the sale-deed being, however, taken in the name of the appellant.

On a question arising, in a suit brought by the plaintiff for partition, as to the plaintiff's rights in respect of (1) the property which the appellant had as a minor inherited from his father, and (2) the undivided half-share subsequently purchased from the appellant's cousin, *held*

(1) that the onus was on the plaintiff to establish that the property which the appellant had as a minor inherited from his father was partible and he had an interest in it, and that he had not discharged that onus; and

(2) that, with regard to the share subsequently purchased, any pre-[redacted] as to the joint nature of the purchase which might arise from the joint nature of the funds which went for the purchase was sufficiently rebutted by the fact that during the appellant's minority the rest of the family had undoubtedly received proportionately greater advantage from the appellant's separate property, and the evidence that they desired to recognise that by acquiring the second half for the appellant himself.

The case is not one of an original member of a Hindu family becoming a convert, but electing to retain his interest in the family property on the old footing. Here a definite cession to a Hindu family of property which originally did not belong to the family by a non-member of the family who was a Christian has to be proved.

Appeal No. 108 of 1926 from a judgment and decree, dated the 17th April, 1924, of the High Court of Judicature at Madras (Phillips and Madhavan Nair, JJ.) affirming a judgment and a decree, dated the 11th August, 1920, of the Court of the Temporary Subordinate Judge of Cuddapah, which affirmed a judgment and a decree, dated the 1st March, 1919, of the Court of the District Munsif of Proddatur.

The case in the High Court is reported in 90 I.C. 1016.

The suit giving rise to this appeal was brought by the plaintiff 1st respondent against his undivided brothers, defendants 1 and 2, and their sister's son, defendant 3, for a declaration that he and defendants 1 to 3 were each entitled to one-fourth share in the entire properties of the family, and for partition. The defendants resisted his claim, alleging that certain properties belonged exclusively to defendant 3. The Trial Court

found that all the properties were joint and were liable to be divided equally, and passed a decree accordingly. On appeal by defendant 3, the 1st Appellate Court confirmed the decree of the Trial Court. Defendant 3 preferred a second appeal to the High Court, but that Court also accepting the finding of the Lower Courts dismissed the appeal. Hence the present appeal preferred by defendant 3 to His Majesty in Council.

Dunne, K.C. and *K. V. L. Narasimham* for appellant.

De Gruyther, K.C. and *P. V. Subba Row* for respondents.

Dunne, K.C.—The *karar* of July, 1916, though unregistered, was admissible in evidence as showing that the property now claimed by the appellant as his own was not treated as joint family property. See *Varada Pillai* v. *Jeevarathnammal*[1] where the Judicial Committee held that although an unregistered document was not admissible to prove a gift, it could nevertheless be referred to as explaining the nature and character of the possession of the party.

[*Sir Lancelot Sanderson.*—The words of S. 49 of the Registration Act are very wide.]

The section merely says that a document requiring registration is not, unless registered, to be treated as a transaction which affects the property.

[*Lord Phillimore.*—There must be some limit on the word "affecting" in S. 49.]

A document though unregistered is admissible for a collateral purpose. The Registration Act has nothing whatever to do with the admissibility of a document for a collateral purpose, although the document may be perfectly bad, by reason of non-registration, for affecting the property. I also rely on the doctrine of part performance. The unregistered *karar* was acted upon in this case. Where a written document is defective as a valid and finally concluded agreement such defect may be supplied by the subsequent actings and conduct of the parties. *Mahomed Musa* v. *Aghore Kumar Ganguli.*[2]

[*Sir Lancelot Sanderson.*—Was S. 115 of the Evidence Act referred to in that case?]

[*Lord Phillimore.*—We can consider the question of part performance only in cases where the parties have acted upon the document.]

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1. (1919) I.L.R. 43 M. 244: L.R. 46 I.A. 285: 38 M.L.J. 313 (P.C.).
2. (1914) I.L.R. 42 C. 801: L.R. 42 I.A. 1: 28 M.L.J. 548 (P.C.).

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Lord Atkin.

15th November, 1928. Their Lordships' judgment was delivered by

LORD ATKIN.—This is an appeal from a judgment of the High Court of Madras affirming a judgment of the Temporary Subordinate Judge of Cuddapah who affirmed a judgment of the District Munsif of Proddatur. The suit is brought by the plaintiff, a member of a joint undivided Hindu family, for partition. The defendants, so far as is relevant to the present issues, are his two brothers and the appellant Jogi Reddi. The question at issue is whether certain properties are, as the plaintiff affirms, joint family properties, or, as the appellant affirms, the separate property of the appellant.

Chinnabbi Reddi the plaintiff, Munir Reddi and Chinnabali Reddi were brothers forming a joint Hindu family. They owned some 17 acres of land of poor quality and were poor folk. They had a sister, Sanjamma, who married Chinnaya, a Christian. The appellant, Jogi Reddi, is the only son of the marriage. Chinnaya was in better circumstances than his wife's family. He owned 24 acres of land apparently of good quality: part of it being represented by an undivided half interest in land of which the other half interest was owned by his brother. After his marriage, Chinnaya came to live in his wife's village. He died in 1887, when Jogi Reddi the appellant was about four years old, leaving the appellant the heir to his property. After his death, the mother and child went to live with the child's uncles. From that time onwards the uncles treated the minor's property in the same way as their own family property; they cultivated it and treated the produce as joint property. With their resources so reinforced they rose to comparative affluence. In 1901, Jogi Reddi attained his majority. The position remained unchanged; the family fortunes increased: individual members adventured in road repairs, indigo, nut crushing, the proceeds going to a common fund. In 1906 the outstanding half interest in Chinnaya's ancestral property was bought for Rs. 760 from his brother's son. It was, as the appellant affirms bought for him out of his share of the proceeds of his land. It was certainly taken in his name. The purchase price was paid for out of the common fund: there appears to have been no other fund out of which it could be paid. In 1916, Chinnabbi Reddi became dissatisfied with the administration of the family affairs and claimed partition. In July, 1916, an agreement was come to between the parties and reduced into writing, whereby a partition was arranged. In that division, the lands claimed by Jogi Reddi

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as his own were excluded from division, and a grant of further lands was also made to him exclusively. The agreement was, unfortunately, not registered, and is, therefore, under the terms of the Registration Act, not available as evidence of the transaction. It has properly been rejected by all the Courts. The argument has been addressed to the Board that it is admissible as collateral evidence of the conduct of the parties. In the view their Lordships take of the case, they have found it unnecessary to express an opinion upon this point, and for the purposes of their decision have ignored the document.

What then are the rights of the plaintiff in respect of the property which Jogi Reddi as a minor inherited from his father? The subsequent acquisition of the undivided half can be dealt with separately.

In the first place, it is to be observed that the onus is upon the plaintiff to establish that the property is partible and that he has an interest. In the second place, it is agreed that the property in question is not, and never was, in the full sense, family property. It was originally the separate property of the Christian brother-in-law and afterwards of the Christian nephew of the plaintiff. Neither of them ever was or could become a member of a joint Hindu family. The rights of the Hindu family over the property must depend on some cession by the owner. Formal grant there was none, and the case turns, as the Courts below held, upon the contractual relations of the parties, to be inferred from all the circumstances. The peculiar circumstances have naturally caused some difficulty in formulating the plaintiq's case. The plaintiff in his plaint claims the property as part of the family property, undistinguishable from the original family ancestral property. The learned District Munsif points out that it may not be quite legal and correct to describe the suit as a suit for partition of family properties. "In one sense," he says, "it is such a suit and in another sense it partakes of the character of a suit for dissolution of partnership." He proceeds to point out that Jogi Reddi could not have acquired the ordinary joint interest in the joint family property carrying with it the right of survivorship. He concludes, therefore, that he and the members of the joint family constituted a sort of partnership though not as joint owners, but as tenants-in-common. But obviously, this situation conflicts with the position of the brothers as members of the Hindu family. The learned Munsif solves the difficulty by concluding that "while Jogi Reddi was a tenant-in-common with the

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family as a separate entity, his rights being regulated by express or implied contract so far as the brothers were concerned, they were certainly joint tenants." The learned Subordinate Judge seems, however, to have treated the property as having become in the full sense family property. A convert, he says, "though not bound by the Hindu Law may by his course of conduct show by what law he intends to be governed regarding his rights and interests and his powers over property. In the present case I have no doubt that the third defendant (the appellant) lived with his maternal uncles as a member of a Hindu family." The learned Judges of the High Court, rejecting the suggestion of partnership, think that the combination of the family cannot be said to have gone beyond the mere stage of co-ownership; but they accept the finding of the Lower Courts which they state to be that all the properties were treated as the common property of the whole family, which necessarily implied an agreement between the members that they were all to share the properties alike. This seems to ignore the difficulties pointed out by the learned Munsif as to the difference between the family relations as to the original family properties and the properties which descended from Chinnaya.

Their Lordships would further observe that all the Courts below seem to have thrown the onus upon the appellant of proving that the properties he claimed were his own, instead of placing it as it should be upon the plaintiff. It, therefore, appears to their Lordships that there is no question of fact so found that can be binding upon an Appellate Court on a second appeal; and that it is necessary for them to consider what is the true position. They have come to the conclusion that the plaintiff has failed to make out that he is entitled to a share in the property, which the appellant inherited from his father. Admittedly, if the plaintiff acquired any interest in such property he did so by reason of some implied contract. For the first twelve or thirteen years of the association of uncles and nephew from which the contract is sought to be implied, the nephew was not of disposing capacity, and their Lordships see no reason for assuming that after he reached his majority, all other circumstances remaining the same, the necessary inference is that he made a gift to his uncles. The difficulties so clearly pointed out by the learned Munsif, of the difference between the tenure of the family ancestral property with the right of survivorship and the interest in Jogi Reddi's property with no right of survivorship, make the alleged gift the less likely. Their Lord-

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ships are not prepared to accept the view adopted apparently by the learned Munsif alone, in the Courts below, of a tenancy in common between the uncles as a family on the one side and the nephew on the other. The facts that the property was jointly cultivated and the proceeds of the produce pooled appear to be entirely consistent with the land itself remaining as it certainly did during the minority of Jogi Reddi his separate property. In the circumstances the purchase of the second half interest in the name of Jogi Reddi appears to bear out the notion of the original half interest being his; though if the property had otherwise been proved already to have become family property, no particular importance would be attached to a purchase in this form. This is not the case of an original member of a Hindu family becoming a convert but electing to retain his interest in the family property on the old footing. Here a definite cession to a Hindu family of property which originally did not belong to the family by a non-member of the family who was a Christian has to be proved. And in their Lordships' opinion the plaintiff has not discharged the onus of proof.

This disposes of the plaintiff's claim to share in the property which descended to Jogi Reddi from his father. As has been intimated above, their Lordships are of opinion that the undivided half share purchased from Jogi Reddi's cousin and taken into his own name is not shown to be property of the joint family. The learned District Munsif took the view that as the source from which the consideration proceeded was joint income, the purchase must also be imprinted with that character. The argument undoubtedly deserves consideration, but the circumstance mentioned is not conclusive; and the facts that during Jogi Reddi's minority the rest of the family had undoubtedly received proportionately greater advantage from the minor's separate property, and the evidence that they desired to recognise this by acquiring the second half for Jogi Reddi himself appear to displace any such presumption as is relied on by the learned Munsif.

As to the balance of the immoveable property and as to the moveables, it is admitted that as the *karar* is unenforceable the plaintiff is entitled to a fourth share. This is consistent with the view, which their Lordships conceive to be correct, that the produce of the properties and services of the members of the family and Jogi Reddi was treated by all the parties as joint. Their Lordships were not asked to adjust any distribution that has already been decreed in this respect. Their Lordships are of opinion that the original decree should be varied on the footing

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that the properties included in list 1 of the third defendant's written statement filed on Aug. 29, 1917, should be excluded from the properties in which the plaintiff is entitled to one-fourth share; and that the plaintiff is entitled, excluding Jogi Reddi, to one-third of the ancestral property of the three brothers; and that the suit should be remitted to the High Court to give effect to their Lordships' judgment; and they will humbly advise His Majesty accordingly. The appellant should receive his costs from the plaintiff here and in the Courts below.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.

Bal Kishen *alias* Balli, since deceased (now represented by Bansidhar and others) .. *Appellants**

v.

Ram Charan and another .. *Respondents.*

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Bal Kishen v. Ram Charan.

Deed—Setting aside of—Suit by executant for—Onus of proof in—Appeal—Finding of fact of trial Judge—Reversal of—Propriety—Additional evidence before Appellate Court justifying reversal.

In a suit by the plaintiff attacking two transfers of property, one purporting to be by herself in favour of *C*, and one by *C* in favour of *R*, *held*, that the burden was on the plaintiff of establishing both attacks.

Held further that, as the Judges of the High Court had an additional advantage over the trial Judge, *viz*, a witness who produced certain account books which, so far as they went, made in favour of the plaintiffs' case, the Judges of the High Court were justified in reversing the finding of the trial Judge in favour of the defendants.

Appeal No. 5 of 1927 from a judgment and decree of the High Court, Allahabad (Sulaiman and Kanhaiya Lal, JJ.), dated the 28th May, 1924, reversing a judgment and decree of the Court of the Subordinate Judge of Jhansi, dated the 25th October, 1920.

The facts of the case appear sufficiently from the following extracts from the judgment of the High Court:—

"The dispute in this appeal relates to a house and certain shops situated in the town of Konch, District Jalaun. These properties have been attached in execution of a decree obtained by

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*P.C. No. 5 of 1927. 26th October, 1928.

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the defendant-respondent, Balkishen, against Raghunath Dantre, the father of the other defendant-respondent. The plaintiff, Musammat Rani Dulhin, claimed the said properties as her own and filed an objection to their attachment, alleging that a sale-deed purporting to have been executed by her in favour of Chhotey Lal on the 9th June, 1902 was fictitious and without consideration, but her objection was disallowed. The present suit was then filed by her for a declaration that the properties in question belonged to her and that they were not liable to attachment and sale in execution of the decree obtained by the defendant Balkishen against Raghunath Dantre, the father of the other defendant. She also claimed a declaration that the sale-deed purporting to have been executed by her in favour of Chhotey Lal and another purporting to have been executed by Chhotey Lal in favour of Raghunath Dantre were void, ineffectual and without consideration. The claim was opposed by the defendant decree-holder whose contention was that the sale effected by Musammat Rani Dulhin in favour of Chhotey Lal and that effected by Chhotey Lal in favour of Raghunath Dantre were genuine and for consideration, and that after the execution of the previous sale-deed Chhotey Lal, and after him Raghunath Dantre and his heirs have been in possession of the said properties."

The Trial Court came to the conclusion that the sale-deed executed by Musammat Rani Dulhin in favour of Chhotey Lal and that executed by Chhotey Lal in favour of Raghunath Dantre were genuine transfers made for consideration and that the plaintiff was not entitled to the declaration claimed.

The plaintiff, Rani Dulhin, then appealed to the High Court against the said judgment of the Subordinate Judge, dismissing her suit. The appeal was heard by a Bench composed of Sulaiman and Kanhaiya Lal, JJ., who, by their judgment, dated the 28th May, 1924, allowed the appeal. They held as follows:—

"The original sale-deeds along with the title deeds of the properties in question have been produced by Musammat Rani Dulhin, and taking that fact into consideration, along with the absence of any entry showing the payment of the consideration money either in the account books of Chhotey Lal or Raghunath Dantre, we have no hesitation in finding that the sale-deeds in question were executed fictitiously with the object mentioned without any consideration."

Wallach for appellants.

Majid for respondents.

Wallach.—The evidence establishes that the sale-deeds in question are valid and for consideration. S. 115 (the estoppel section) of the Indian Evidence Act, 1872 referred to.

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Bal Kishen v. Ram Charan.

Lord Phillimore.

26th October, 1928. Their Lordships' judgment was delivered by

LORD PHILLIMORE.—This appeal arises in a suit by Rani Dulhin, since deceased, attacking two transfers of property, one purporting to be by herself in favour of Chhotey Lal, and one by Chhotey Lal in favour of Raghunath Das. The burden is on the plaintiff of establishing both attacks. The main one for her was the attack on the first conveyance, because if the first conveyance was good she at any rate had no title and it was no concern of hers whether the second was good or bad. If, on the other hand, the first conveyance was bad and Chhotey Lal got no title, it is not now contended that he was able in the circumstances to pass a good title to Raghunath Das. Therefore their Lordships have only to look into the circumstances of the second transaction as affording assistance in examining the truthfulness of the two stories as to the first transaction. As they have already observed, the burden was upon the plaintiff Rani Dulhin. Their Lordships have been quite sensible of that throughout the case and they are also aware that the Judge of first instance found in favour of the defendants. The Judges in the High Court had, however, an additional advantage, because they had a witness who produced certain account books, and certainly as far as they they go they make in favour of the case of Rani Dulhin and her present representative. At any rate, after listening to the very careful argument of Mr. Wallach and giving all weight to the first judgment, their Lordships find that the reasons of the Judges in the High Court are more convincing; and they see no reason for disturbing their conclusion. Therefore they will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Madduri Venkata Someswara Rao *alias* Venkata Subbanna, minor by guardian and natural father, Kumaraswami Sastri .. *Appellant** (*Petitioner-2nd deft.*)

v.

Pulavarty Lakshmanaswami .. *Respondent* (*Cr.-petitioner-Decreeholder*).

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Venkata Someswara Rao
v.
Lakshmanaswami.

Civil Procedure Code (*V of* 1908), *O.* 32, *R.* 3—*Executant of a document on behalf of a minor—Appointment of such person as guardian* ad litem—*If void—Question of fact.*

The question whether, when a person has executed a document or entered into a transaction on behalf of a minor as his guardian, that same person can be validly appointed guardian *ad litem* of the minor in a suit brought against him on the document or transaction in question, is a question of fact governed by no hard-and-fast rule of law, and there is nothing either in the Civil Procedure Code or in any of the authorities to lay down not merely that such a person should not as a rule be appointed but cannot in any circumstances be validly appointed, though in a vast majority of cases to appoint such a person would be wholly undesirable.

Appeal against the order of the District Court of West Godavari at Ellore, dated the 30th September, 1926, in Appeal No. 238 of 1926 preferred against the order of the Court of the District Munsif of Bhimavaram in C.M.P. No. 2122 of 1925 in O.S. No. 348 of 1921.

G. Lakshmanna for appellant.

V. Viyyanna for respondent.

The Court (Kumaraswami Sastri and Devadoss, JJ.) made the following

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ORDER OF REFERENCE TO A FULL BENCH. *Kumaraswami Sastri, J.*—This appeal arises out of an application by a minor to remove an attachment of his properties in execution of the decree in O.S. No. 348 of 1921 on the ground that he was not properly represented in the suit and that the decree which was

*A.A.A.O. No. 6 of 1927. 2nd November, 1928.

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collusively obtained is not binding on him and is not executable against him. The District Judge held that it was not competent for the minor to raise the question in execution and hence this appeal.

The petitioner is the adopted son of one Venkata Subbanna and legatee under his will. The adoptive mother of the minor was appointed executrix and under the Hindu Law she would be the natural guardian. She was however removed from the guardianship and the natural father of the minor was appointed guardian under the Guardian and Wards Act. The order was made on the 21st of March, 1922 but he gave security on the 27th of September 1922.

O.S. No. 348 of 1921 was filed by the plaintiff against the minor on a promissory note executed by the adoptive mother purporting to act as his guardian. The plaintiff applied to appoint the adoptive mother as the guardian *ad-litem* of the minor though she was the executant of the promissory note and she was appointed guardian *ad-litem*. She raised no defence and an *ex parte* decree was passed against the minor. The appointment of the defendant's natural father as guardian by the District Court was after the adoptive mother was appointed guardian *ad-litem* but before the decree. The plaintiff took no steps to inform the Court of the fact that the District Court appointed the natural father as guardian or get the guardian so appointed brought on record as guardian of the minor. In *Bhimaji* v. *Hussain Saheb* [1] it was held by Sadasiva Aiyar and Spencer, JJ., that if a minor has a guardian appointed for him by a competent authority and a decree is passed with somebody else as guardian *ad-litem*, the decree is not binding on the minor even though the Court may have acted in ignorance of the existence of the guardian so appointed.

Rule 3 of Order 32 of the Code of Civil Procedure requires that the guardian *ad-litem* of a minor should not be one whose interests are adverse to those of the minor. It is contended for the appellant that the executant of a document is not, in a suit against the minor on the document, a fit and proper person as his interests are adverse to those of the minor, he being by reason of his position as the executant prevented from raising pleas as to the validity of the document which a stranger can raise and that in any event it is to his interest to support the document as otherwise he may become personally liable. It

1. (1920) I.L.R. 43 M. 808: 39 M.L.J. 239.

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is also contended that where a person whose interests are adverse is appointed, the appointment being in contravention of Rule 3, Order 32, is invalid and the minor should be treated as unrepresented and that any decree against him, it is argued, is void and incapable of execution. It is also argued that in such cases objection can be taken in execution.

It is contended for the respondent that the fact that the executant of a document is appointed guardian-*ad-litem* does not necessarily render the appointment invalid, that at best it would give the minor a right to set aside the decree if there was any injury to him by reason of any fraud or collusion and that where a decree has been passed it cannot be questioned in execution but a separate suit ought to be filed.

The questions that arise are (1) is the appointment of the executant of a document or a person who enters into a transaction sued on as the guardian of a minor in a suit upon the document or the transaction valid? and (2) whether the question as to the minor being unrepresented either by reason of the invalidity of the appointment or by reason of the guardian appointed not putting forward any defence and thereby prejudicing the minor can be raised in execution.

I have little doubt that the person who executes a document or enters into a transaction should not as a rule be appointed as a guardian-*ad-litem* of a minor in a suit upon the document or transaction as such a person is interested in upholding the transaction which he has entered into and is precluded by law from raising some at least of the defences which would be open to third parties to raise on behalf of the minor. No person should be appointed to represent the interests of a minor whose interests may conflict with his duty as guardian. I think that the express prohibition in Order 32, Rule 3, makes an appointment in contravention of its terms invalid and is not a mere irregularity.

There can be little doubt that if a minor was entirely unrepresented, the decree would be a nullity. I may refer to the decisions of their Lordships of the Privy Council in *Khiarajmal* v. *Daim*[2] and *Rashid-un-nisa* v. *Muhammad Ismail Khan*[3] and to the decision of Madhavan Nair, J., in *Arunachallam Chetty* v. *Abdul Subhan Sahib*,[4] where the learned Judge held that the

2. (1906) I.L R. 32 C. 296: L.R. 32 I.A. 23 (P.C).
3. (1909) I.L.R. 31 All 572: 19 M.L.J. 631 (P.C).
4. (1925) 50 M.L.J. 232.

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question can be raised in execution. I think the same result must follow if a minor is represented by a guardian whose interests are adverse to those of the minor as it will be in express contravention of Rule 3, Order 32, and the *ratio decidendi* in *Bhimaji* v. *Hussain Saheb* [1] would apply. In *Sellappa Goundan* v. *Masa Naiken* [5] it was held by Odgers and Hughes, JJ., that a minor represented in a suit by a guardian-*ad-litem* whose interests are adverse to those of the minor is not legally represented at all in the suit. It appears from the facts of that case that the father who executed the bond on which the suit was filed was appointed guardian-*ad-litem* of his minor sons and the learned Judges were of opinion that such an appointment was invalid as the interests of the father were adverse to those of his sons and that the decree obtained did not bind the minors. In Second Appeal No. 1092 of 1918, Oldfield and Hughes, JJ., referring to the decision of their Lordships of the Privy Council in *Rashid-ur-nisa* v. *Muhammad Ismail Khan*[3] observe: "We must accept it as deciding that the representation of a minor by a guardian whose interest is adverse is no legal representation at all, the rule being that the decision obtained in proceedings so instituted is null and void." The learned Judges were of opinion that the father who was the debtor and on whose liability the claim against both the father and the minor son was based was a person whose interests were adverse and he was disqualified under Order 32, Rule 3, and that the decree was void against the minor.

A contrary view was taken in Appeal No. 347 of 1919 by Sadasiva Aiyar and Napier, JJ. The learned Judges were of opinion that where a guardian-*ad-litem* was appointed, the decree was good even though his interests were adverse. The same view was taken by Sadasiva Aiyar, J., in *Payidanna* v. *Lakshminarasamma*.[6] The matter was again raised before me and Wallace, J., in C.M.A. No. 269 of 1927, and we were of opinion that it was open for a minor to prove that the interests of the guardian-*ad-litem* or the next friend were adverse and he was not properly represented and that if he showed that he was prejudiced the decree would not bind him.

The balance of authority is against the view taken by Sadasiva Aiyar, J., that even if it is shown that the interests of the

1. (1920) I.L.R. 43 M 808: 39 M.L.J. 239
3. (1909) I L.R. 31 I.A. 572: 19 M.L.J. 631 (P.C).
5. (1923) I.L.R. 47 M. 79: 45 M.L.J. 675.
6. (1914) I.L.R. 38 M. 1076: 28 M.L.J. 526.

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guardian are adverse to those of the minor the appointment of the guardian-*ad-litem* would still be good and the decree still valid against the minor.

As regards the question whether objection can be taken in execution or a separate suit should be filed, it seems to me that a distinction must be drawn in these cases as to whether the decree is void against the minor or is only voidable. If the decree is void, it is difficult to see why the matter could not be raised in execution. It seems to me to be a great hardship for the minor that he should be powerless to prevent his properties from being sold in execution and that his only remedy should be to file a regular suit with incidental expenditure of money and delay in getting a final decree. The question may also arise as to how far *bona fide* purchasers in execution of the decree would be affected by any subsequent adjudication if the decree was not binding on the minor. If the question were merely one of balance of convenience, it is better that the question as to whether the decree is void and not executable should be decided in execution proceedings rather than proceedings in execution which may be subsequently decreed to be invalid against a minor should be allowed to go on and properties sold under an invalid decree. The duty of the Court to see that a minor is properly represented and is not prejudiced by any violation of the laws enacted for his benefit is better fulfilled by deciding the question when it is sought to execute the decree against him. All the minor's property may be sold and he reduced to beggary in execution of a decree void against him. Giving him a right to file a suit and recover his property after all the mischief is done is not of much use.

In *Rajah of Kalahasti* v. *Venkatadri Rao Garu*[7] it was held that the general rule that an executing Court cannot go behind the decree would not apply to cases involving the infraction of law enacted in the public interest and the learned Judges refer to the decisions of this Court and the other Courts on the point. There is no reason why the rule should not apply to cases where there is infraction of the rule about the appointment of guardian-*ad-litem* which is for the benefit of the minor.

Reference has been made by the respondent to *Kalipada Sarkar* v. *Hari Mohan Dalal*,[8] where it was held that the executing Court could not go behind the decree; to *Zamindar of Ettiya-*

7 (1927) 53 M.L.J. 533.
8. (1916) I.L.R. 44 C. 627.

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puram v. *Chidambaram Chetty*,[9] where it was held that a party who does not raise an objection as to jurisdiction in the course of a mortgage suit is not entitled to take the objection in execution; to *Sami Mudaliar* v. *Muthiah Chetti*[10] where Ayling and Odgers, JJ., followed *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*[9] and were of opinion that the decision in *Lakshmanaswami Naidu* v. *Rangamma*[11] was overruled and to *Lahore Bank* v. *Ghulam Jilani*,[12] where it was held that the executing Court cannot refuse to execute the decree on the ground that the minor was not represented in the suit. In *Gora Chand Haldar* v. *Prafulla Kumar Roy*[13] it was held by a Full Bench that where a decree is made by a Court which apparently had no jurisdiction either pecuniary or territorial or in respect of the debtor's person to make the decree it may be questioned in execution proceedings and that the executing Court can refuse to execute the decree on this ground. If this is good law, there seems to be no reason why it could not be pleaded that a decree is void so far as the party against whom it is sought to be executed is concerned.

Having regard to the importance of the question raised and the conflict of opinion referred to above and the desirability of having an authoritative ruling in such cases, I would refer the following questions for the decision of a Full Bench:—

(1) Whether the appointment of a person who executes a document or enters into a transaction as the guardian-*ad-litem* of a minor is valid in a suit on the document or transaction;

(2) Whether the appointment of a person whose interests are adverse to those of the minor as his guardian-*ad-litem* renders the decree void against the minor or only voidable by him;

(3) Whether objection could be taken in execution that the decree is void.

Devadoss, J.

Devadoss, J.—The appellant is a minor and was adopted to one Madduri Venkata Subbanna by his widow. She renewed a pro-note executed by her husband in favour of the plaintiff who brought a suit on the pro-note against the widow as 1st defendant and the appellant as 2nd defendant with his adoptive mother as his guardian-*ad-litem* and obtained a decree. He now

9 (1920) I.L.R. 43 M. 675: 39 M.L.J. 203 (F.B.).
10. (1922) 43 M.L.J. 293
11. (1902) I.L.R. 26 M. 31.
12. (1923) I.L.R. 5 Lah. 54.
13 (1925) I.L.R. 53 Cal 166 (F.B.).

seeks to execute the decree against the property of the minor. Various objections were raised against the execution of the decree, but the main objection is that the appellant was not properly represented in the suit as the 1st defendant's (the adoptive mother's) interests were adverse to those of the appellant and her appointment as guardian-*ad-litem* was therefore illegal and the decree is a nullity and cannot be executed against the appellant. Both the Lower Courts have disallowed the contention of the appellant and directed the execution of the decree against his property. Hence this appeal with his natural father as his guardian.

Mr. Lakshmanna for the appellant raises two contentions (1) that the decree obtained against the minor appellant with a guardian whose interests were adverse to those of the minor is a nullity and therefore cannot be executed against the minor's property; (2) the executing Court can entertain an objection to the legality of the decree when it was obtained against a minor with a guardian-*ad-litem* whose interests were opposed to those of the minor. Order 32, Rule 3 (1), Civil Procedure Code, says:

> "Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor."

Clause (3) says:

> "Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed"

Rule 4 is as follows:

> "Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff"

Under these rules the Court has to see that the next friend or the guardian-*ad-litem* has no interest adverse to that of the minor Where a suit is brought against a minor, an application has to be made under Rule 3 for the appointment of a guardian-*ad-litem* for the minor, and the application has to be made by the plaintiff or on behalf of the minor supported by an affidavit that the proposed guardian has no interest adverse to that of the minor and the Court on being satisfied that the proposed guardian has no interest adverse to that of the minor may appoint the person proposed as guardian-*ad-litem* for the suit. Where there

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is a guardian appointed either under the Guardian and Wards Act or under a will such guardian should be appointed as guardian for the suit, unless the Court is satisfied that the person is unfit or has an interest adverse to that of the minor in the matters in controversy in the suit. It is the duty of the Court to be satisfied that the interests of the person proposed are not adverse to those of the minor. If in the course of the trial it transpires that the guardian-*ad-litem* has an interest adverse to that of the minor, the Court would not be justified in allowing the guardian to act for the minor but should remove him and appoint some one else who has no interest adverse to that of the minor as guardian for the suit. The question is complicated by the peculiar principle of Hindu Law which permits a Hindu father to incur debts which would bind him as well as his sons. The question really is, if in a suit for the recovery of a debt incurred by the father, his minor son is made a party, is it illegal in all cases to appoint the father guardian-*ad-litem* for the minor, and is the decree obtained against the son a nullity? To hold that the father's interest is always opposed to that of the son whenever a suit is brought against the father and son for enforcement of a debt incurred by the father would result in the father being ineligible to be the guardian-*ad-litem* of his minor son whatever may be the nature of the debt, and however beneficial it may have been to incur it. There are occasions when the father has to incur debts to save the family property or to benefit the estate In such cases it cannot be said that the father's interests are opposed to those of the son. To hold otherwise would not only be unjust but would not be in the interests of the minor, and Rule 3 does not warrant laying down such a hard and fast rule. Order 32, Rule 3, clause (3) says:

"that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed."

First he must have an adverse interest and secondly the adverse interest must be in the matters in controversy in the suit. It is only then that he would not be a fit person to be appointed guardian-*ad-litem* if in other respects he is a fit person to be appointed.

In many cases it may not be possible before the written statement is filed for the Court to say whether the father has any interest adverse to that of the son. The appointment of a guardian-*ad-litem* is before the written statement is filed and if on the face of the pleadings and in the light of the plaintiff's

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affidavit or the affidavit put in on behalf of the minor, there is no reasonable suspicion of there being an interest adverse to that of the minor, the appointment of the father as guardian-*ad-litem* is not illegal. It is only after the written statement is put in that the Court would have some knowledge of the nature of the defence put forward on behalf of the minor. If nothing transpires in the course of the trial to show that the father has an interest adverse to that of the minor it is difficult to see how the decree obtained against the minor could be said to be illegal.

The second question is, can the executing Court entertain an objection to the execution of the decree against a minor on the ground that the guardian-*ad-litem* had an interest adverse to that of the minor in the suit? If the decree is not illegal on the face of it, is it open to the executing Court to go behind it? Where the illegality of the decree is not apparent on the face of it, to hold that the executing Court could entertain an application to the validity of the decree would open the door to frivolous objections and to wasting the Court's time in embarking upon an enquiry which would be not only futile but which would impede the course of justice. It is open to the minor to have the decree set aside in a properly framed proceeding, but he cannot be allowed to resist execution by pleading in the executing Court the illegality of the decree on the ground that his guardian-*ad-litem's* interests were adverse to him in the matters in controversy in the suit in which the decree was passed.

The case where the minor was never represented at all in the suit in which the decree was obtained stands on a different footing as there can be no decree against a person who is not a party to the suit. For instance, where no guardian-*ad-litem* is appointed to represent a minor in a suit or where there is a guardian appointed under the Guardian and Wards Act and another person is appointed guardian-*ad-litem* and a decree is obtained against the minor. In such cases there could be no decree against the minor as he was not properly represented in the suit, and objection could be taken to execution on the ground that there is no decree against the minor and the executing Court will be bound to see whether there is or there is not a decree against the minor, in the same way as when a decree against one AB is sought to be executed against another AB as if the decree is against the latter. A person against whom a decree is sought to be executed is entitled to say to the executing Court that he

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is not the judgment-debtor though he bears the same name as the judgment-debtor and the decree is not against him but against some one else; and the Court would have to decide before levying execution whether the decree is being sought to be executed against the right person or not and if he is the right person he cannot be heard to say that the decree was not properly obtained against him. If he impeaches the decree as having been obtained by fraud or that it is invalid for other reasons, his remedy is by a proper proceeding to set aside the decree and not by resisting execution on the ground that it was obtained against him by perpetration of fraud or is otherwise illegal. The case of a Hindu mother stands on the same footing as that of the father. To hold that in all cases where a debt incurred by the mother is sought to be recovered from the son's property the mother's interest is adverse to that of the minor and that she is ineligible to be his guardian is not warranted by the Hindu Law. Such a sweeping proposition would not only be unjust but might work hardship in many cases. Each case would depend upon its circumstance.

There are a number of decisions on the points raised and all of them cannot be reconciled. Mr. Lakshmanna for the appellant relies upon *Arunachallam Chetty* v. *Abdul Subhan Sahib*[4] as supporting his contention. In that case Madhavan Nair, J., held that the decree passed against a minor who was not represented in the suit by a guardian was void and incapable of execution and hence in execution proceedings objections could be raised regarding the legality of the decree. In that case, the decree was obtained against a minor and he was not properly represented in the suit. On behalf of the creditor the contention was raised that the executing Court could not go behind the decree or entertain an objection to its validity. Madhavan Nair, J., following *Jungli Lall* v. *Laddu Ram Marwari*[14] observed that the decree was a void decree and might be disregarded altogether without taking any proceedings to set it aside. In *Bhimaji* v. *Hussain Saheb*[1] Sadasiva Aiyar and Spencer, JJ., held a decree obtained against a minor represented not by a guardian appointed for him but by another, though the Court acted in ignorance of the existence of the appointed guardian, was not binding on the minor. In that case, there was no ques-

1. (1920) I.L.R. 43 M 808 39 M.L J. 239.
4 (1925) 50 M.L.J. 232.
14. (1919) 4 Pat. L.J. 240 (F B.).

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tion of the executing Court entertaining an objection to the validity of the decree. That was a suit in which the plaintiff represented by a certificated guardian sued to set aside the decree passed against him in a suit brought by the 1st defendant as plaintiff on a mortgage bond executed by the plaintiff's mother. Sadasiva Aiyar, J., after reviewing the authorities held that there was no legal representation of the minor in the former suit and decreed the second suit. Spencer, J., held following the Privy Council decision in *Rashid-un-nisa* v. *Mahomed Ismail Khan*[3] that a decree obtained against a person who was not properly represented on the record was void and without jurisdiction against such person. In *Rashid-un-nisa* v. *Mahomed Ismail Khan*[3] a married woman was appointed guardian-*ad-litem* of a minor sister. Under the Civil Procedure Code of 1882, section 457, a married woman could not be appointed guardian-*ad-litem*. The Privy Council held that the appellant was never a party to any of the suits in the proper sense of the term. Her sister Ulfat-un-nisa was a married woman and therefore was disqualified under section 457 of the Code of Civil Procedure from being appointed guardian for the suit and Mauladad's interest was obviously adverse to that of the minor. In that case there was no question of the executing Court sustaining an objection to execution on the ground of the decree being void. After execution proceedings in the previous suit, a suit was brought for setting aside the decree and execution proceeding and the second suit was decided in favour of the minor. In *Chellappa Goundan* v. *Masa Naiken*[5] it was held by Odgers and Hughes, JJ., "A minor represented in a suit by a guardian-*ad-litem* whose interest is adverse to that of the minor, is not legally represented at all" following *Rashid-un-nisa* v. *Mahomed Ismail Khan*.[3] In that case, a suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father and the father was appointed by the Court as guardian-*ad-litem* of his minor sons. A decree was passed against the entire mortgaged property which was sold in execution and purchased by the decree-holder. A suit was instituted on behalf of the minor sons by their mother as their next friend for a declaration that the decree and sale in the previous suit were invalid against them and their shares in the family property. Odgers, J., following *Rashid-un-nisa* v. *Mahomed Ismail Khan*[3] observed: "Representation by a guardian whose interest is adverse is no representation at

3. (1909) I.L.R. 31 All. 572: 19 M.L.J. 631 (P.C.).
5. (1923) I.L.R. 47 M. 79: 45 M.L.J. 675.

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all" and again at p. 84, "I hold that the law goes to this length that a minor represented by a guardian whose interest is adverse is not legally represented at all. This is, I think, the result of the decision in *Rashid-un-nisa* v. *Mahomed Ismail Khan*.[3]" Hughes, J., also observed: "It is clear therefore the interests of the father were adverse to those of his sons and the sons were not legally represented in the suit and the decree does not bind them." In *Rarichan* v. *Manakkal Raman Somayajipad*[15] Krishnan and Ramesam, JJ., observed: "Considering that he was the person who had executed the promissory note on which the suit was brought against the minor he would have been an unsuitable guardian in any event as his interests would clash with the minor's interests" and on the facts of the case held "the appointment is thus vitiated by fraud and is of no legal effect and the case must be treated as having been proceeded with without a legally appointed guardian-*ad-litem*. The decree and the subsequent sale are therefore not binding on the plaintiff." In that case the question of raising objection to the validity of the decree in the executing Court did not arise for consideration. That was a suit by a person after attaining majority for a declaration that a mortgage was not supported by consideration to a certain extent and the decree on the mortgage was obtained by fraud inasmuch as he was not represented in the suit on the mortgage by a proper guardian, and the Court guardian appointed for him acted with gross negligence in the conduct of the case and that the decree was not binding on him and the sale in execution of the decree should be set aside as invalid. In C. M. A. No. 269 of 1927 my brothers Kumaraswami Sastri and Wallace, JJ., held that it was open to a minor to prove that the interests of the guardian-*ad-litem* were adverse to him and that he was prejudiced thereby and if he did that the decree would not bind him.

In *Rajah of Kalahasti* v. *Muni Venkatadri Rao Garu*[7] it was held by Odgers and Curgenven, JJ., "The general rule that an executing Court cannot enquire into the validity of the decree does not apply to a case in which the execution of the decree would involve the infraction of a provision of law enacted in the public interest. It is the duty of the Court, however and whenever such a consequence becomes apparent to it, to stay its hand." This decision does not really touch the present question.

3. (1909) I.L.R. 31 All. 572. 19 M L.J. 631 (P.C.).
7. (1927) 53 M L.J. 533.
15. (1922) 44 M.L.J. 515 at 519.

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It is well settled that a decree could be impeached on the ground of illegality or on the ground of a party not being represented at all, in a properly framed proceeding for the purpose. But the question is whether an executing Court can entertain an objection to execution on the ground that the decree has been obtained by fraud or that it is an illegal one. Some of the decisions go to the length of saying that if a decree is a nullity it could not be executed and the executing Court could therefore entertain an objection on the part of the judgment-debtor that the decree is a nullity. As I have already observed it is open to a person against whom a decree is sought to be executed to show that he was not a party to the suit either because he was not a party *eo nomine* or that he was a minor at the time when the decree was obtained and he was not represented by a guardian at all, or that the guardian appointed by the Court was not a guardian who in law could be a guardian, or there was a proper guardian and the plaintiff instead of making him the guardian-*ad-litem* made another person guardian-*ad-litem*. But where the decree could only be attacked on the ground of some illegality such as the guardian appointed had an interest adverse to that of the minor or that he was negligent in protecting the interests of the minor the question arises whether the executing Court could entertain an objection to execution on those grounds.

The contention on behalf of the respondent is that the executing Court is not entitled to go behind the decree but it should execute the decree as it stands, and any objection on the score of illegality or fraud or negligence of a guardian, or any other objection to the decree should be urged in a proceeding framed for the purpose of setting aside the decree and should not be entertained by the executing Court. There are several decisions which support this contention.

In *Kalipada Sirkar* v. *Hari Mohan Dalal*[8] Mookerji and Cuming, JJ., after an exhaustive examination of the authorities held "the Court executing the decree must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. The validity of a decree cannot be questioned in execution proceedings on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, no decree for costs could have been made against him. A proceeding to

8 (1916) I.L.R. 44 C. 627.

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enforce a judgment is collateral to the judgment, and therefore no enquiry into its regularity or validity can be permitted in such a proceeding." In *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*[9] a Full Bench of this Court held that an objection on the ground of want of territorial jurisdiction must be taken in the suit itself in which the decree was passed and must not be considered and cannot be allowed in execution proceedings. It might be said that section 21 of the Code of Civil Procedure provides that the objection to jurisdiction must be taken at the earliest opportunity, as it reads, "No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of First Instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice." This case does not directly bear on the point. In *Sami Mudaliar* v. *Muthiah Chetty*[10] 4th defendant died after the preliminary decree and before the final decree in the mortgage suit. His legal representative was not brought on record in the application for a final decree. On an application filed by the plaintiff for transfer of the decree for execution to another Court, notice was issued to the 5th respondent, 4th defendant's son, to show cause why he should not be brought on as legal representative of the father. The 5th respondent did not appear. The decree was transferred for execution and certain properties were brought to sale. The 5th respondent filed a suit for a declaration that the decree was not binding on him and for an injunction restraining the plaintiff from executing the decree. It was held that the decree against the deceased was a nullity and that that was not a matter which could have been gone into in execution, but the 5th respondent was not precluded from setting up the plea by reason of his omission to do so in 1916 when notice of an application for transfer was served on him and that the suit brought by him was competent. The learned Judges observed at p. 297, "it seems therefore clear that as far as this Court is concerned the executing Court cannot go behind the decree." In *Vaidialingam Mudaliar* v. *Chidambaram Pillai*[16] it was held that the Court executing the decree must take the decree as it stands and has no power to go behind the decree or entertain objections as to the legality or correctness of the decree. They relied upon

9. (1920) I.L.R. 43 M 675. 39 M.L.J. 203 (F.B.).
10. (1922) 43 M.L.J. 293.
16. (1925) 49 M.L.J. 520.

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the observations of Sir John Wallis, C.J., in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*.[9] "This is the view taken in *Hari Govind* v. *Konherrao Deshpande*[17]; and *Kalipada Sirkar* v. *Hari Mohan Dalal*[8] is also a recent authority for the proposition that the Court executing the decree cannot go behind it." In *Lahore Bank* v. *Ghulam Jilani*[12] Sir Shadi Lal, C.J. and Le Rossignol, J., held that "an executing Court had no jurisdiction to criticise or go behind the decree; all that concerns it is the execution of it. If the decree should be annulled, that is not the function of the executing Court," and they followed *Kalipada Sirkar* v. *Hari Mohan Dalal*[8] and *Rashid-un-nisa* v. *Mahomed Ismail Khan*[3] and dissented from *Jungli Lall* v. *Laddu Ram Marwari*.[14]

Though in *Kalipada Sirkar* v. *Hari Mohan Dalal*[8] it was broadly laid down that "an executing Court could not go behind the decree but should take it as it stands," yet in *Gora Chand Haldar* v. *Prafulla Kumar Roy*[13] a Full Bench consisting of Walmsley, C. C. Ghosh, Suhrawardy, B. B. Ghose and Duval, JJ., felt the necessity for modifying the broad proposition that "the executing Court is bound to see whether there is a decree capable of execution and whether the decree is against the person against whom execution is sought and also to see whether on the face of it the decree is one which is capable of execution against the person sought to be proceeded against." Supposing a decree gives a personal remedy against a woman, would the executing Court be justified in executing it if such a decree is on the face of it illegal for, the law prohibits the passing of a decree against a woman so as to make her person liable for arrest. Walmsley, J., who delivered the judgment of the Full Bench observed at page 173: "I think it may be said that the correct view, and the view for which there is a strong current of authority, is that where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial, or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits I think that the execut-

3. (1909) I.L.R. 31 A. 572: 19 M.L.J. 631 (P.C.).
8. (1916) I.L.R. 44 C. 627.
9. (1920) I.L.R. 43 M. 675: 39 M.L.J. 203 (F.B.).
12. (1923) I.L.R. 5 Lah. 54.
13. (1925) I.L.R. 53 C. 166 (F.B.).
14. (1919) 4 Pat. L.J. 240 (F.B.).
17. (1913) I.L.R. 38 B. 194.

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ing Court is authorized to question the validity of a decree." The observation that the Court which passed the decree had not territorial jurisdiction is a matter which could be raised before the executing Court is directly opposed to the decision of the Full Bench in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty.*[9]

In *Jungli Lall* v. *Laddu Ram Marwari*[14] it was held by a Full Bench of the Patna High Court "when at the time of the passing of a final decree in a mortgage suit, one of the judgment-debtors was dead and his representatives have not been brought on to the record, it is open to such representatives to object to execution of the decree on the ground that the decree is a nullity, and the proposition that an enquiry into the validity of a decree is outside the functions of an executing Court is subject to the proviso that there is a valid decree which it can execute. A void decree ought to be disregarded without any formal proceeding to set it aside." The learned Judges proceed upon the footing that a void decree is no decree at all and if a judgment-debtor against whom a decree is sought to be executed was not represented at the time of the passing of the decree, there is no decree against him and what is spoken of as a decree is a nullity. In A.S Nos 347 and 338 of 1919 Sadasiva Aiyar, J., observed with regard to the validity of a decree obtained against a minor represented by a guardian whose interests were adverse to those of the minor, "I am prepared to go further and hold that even if it was adverse, once the Court had appointed her as guardian on the affidavits and facts proved by the affidavits before it, all proceedings against the minor judgment-debtor with the guardian so appointed are valid against the minor till set aside on proper and sufficient grounds in appropriate proceedings taken by or on behalf of the minor." He and Napier, J., were of opinion that a decree should be considered valid till it was set aside in appropriate proceedings.

In *Kuppuswami Aiyangar* v. *Kamalammal*[18] it was held by Oldfield and Phillips, JJ., that where a mother acting as guardian of her minor sons mortgaged the property and a decree on the mortgage was passed against the minors represented by the mother as guardian-*ad-litem* and the properties sold in execution and the sons subsequently sought to recover

9 (1920) I.L.R. 43 M. 675: 39 M.L.J. 203 (F.B.).
14. (1919) 4 Pat. L.J. 240 (F.B.).
18. (1920) I.L.R. 43 M. 842: 39 M.L.J. 375.

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possession of the properties alleging that their mother was not competent to represent them in the previous suit as her interest was adverse to theirs the decree against the minors was not a nullity and had to be set aside and that a suit was consequently maintainable. In *Kari Bapanna* v. *Erranna*[19] it was held that "the defendant is entitled to plead in defence invalidity of the decree obtained against him during his minority on the ground of gross negligence of his then guardian. Such a plea is not untenable because he has not brought a regular suit to have the decree set aside." This does not affect the question whether such a plea could be raised in execution proceedings. In *Subramania Aiyar* v. *Vaidyanatha Aiyar*[20] Oldfield, J., held that a "decree passed after the death of the defendant and before his legal representative was brought on the record was a nullity. The result of the authorities is, if the decree is a nullity, the executing Court can ignore it; if the decree contravenes any specific provision of the law then also the executing Court can ignore it; but where the validity of the decree is attacked on the ground that some fraud was perpetrated in the course of the suit or that there was negligence on the part of the guardian of a minor or that the guardian had some interest adverse to that of the minor the executing Court cannot entertain an objection to execution, but the defendant is entitled to have the decree set aside in a proper proceeding."

It is urged that the appointment of father or mother as guardian whose interest is adverse to that of the minor is a violation of the specific provision of the statute as contained in Order 32, Rules 3 and 4, and therefore the decree must be considered as a nullity. The decree against the minor with such guardian-*ad-litem* is not a nullity. It is also urged that it would be throwing on the minor an unnecessary and unbearable burden by making him prove in a separate proceeding that the decree obtained against him is not valid without allowing him an opportunity to show in the execution proceedings themselves that the decree is one which could not be executed against him. My view is that where a decree is obtained against a Hindu minor boy with the father or mother as guardian-*ad-litem* in a suit on a debt contracted by the father or mother the decree obtained against him is not a nullity but it is liable to be set aside at his instance in a proper

19. (1923) 45 M.L.J. 324.
20. (1913) I.L.R. 38 Mad. 682.

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proceeding and the executing Court should not be asked to try a suit in execution proceedings. As there is a conflict of decisions on this point, I agree to the reference.

G. Lakshmanna for appellant.

V. Viyyanna for respondent.

The Court expressed the following

OPINION.—In this case the adoptive mother of a minor executed in 1918, though the exact date is not given, a promissory note purporting to act as his guardian and to execute it on his behalf. A suit was brought, O. S. No. 348 of 1921, on the promissory note and the plaintiff applied to have the adoptive mother appointed as the guardian-*ad-litem* of the minor, notwithstanding the fact that she was the executant of the promissory note; and she was so appointed. She raised no defence to the suit and an *ex parte* decree was passed; before the decree was passed the natural father had been put in as guardian of the minor and no steps were taken to inform the Court of the existence of the natural father as guardian. But no attempt appears to have been made to substitute him for the adoptive mother as guardian-*ad-litem* in the suit, and he was not so substituted. In these circumstances, the learned Judges propounded three questions for the opinion of a Full Bench.

The first is this:—

"Whether the appointment of a person who executed a document or enters into a transaction as the guardian-*ad-litem* of a minor is valid in a suit on the document or transaction?"

As framed this is almost meaningless; what appears to be meant is this: When a person has executed a document or entered into a transaction on behalf of a minor as his guardian, can that same person be validly appointed guardian-*ad-litem* of the minor in a suit brought against him on the document or transaction in question?

It seems to us that this matter cannot be treated as a pure question of law. The appointment of the guardian-*ad-litem* purported to be an exercise of judicial discretion and it seems to us impossible to say that the Court had no discretion in any conceivable case to appoint such a person and that such an appointment would necessarily be void without any enquiry into the particular circumstances of the case. The Code does not say so, and we do not think we can possibly invent such a judicial rule for ourselves. Indeed cases can be imagined

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in which a Court with the facts before it might think that the guardian and executant of the document was quite a suitable person to conduct the suit. Take for instance the case which was put in the course of the argument where the defence was going to be that the guardian when she executed the document was under the influence of fraud or coercion on the part of the payee. No one could suggest that in that event her interest could be said to be necessarily adverse to the minor merely because she signed the actual document herself. That in a vast majority of cases to appoint such a person would be wholly undesirable is manifest. In this case it probably was very undesirable. In our opinion that is a question of fact governed by no hard-and-fast rule of law and there is nothing either in the Code or in any of the authorities to lay down not merely that such a person should not as a rule be appointed but cannot in any circumstances be validly appointed.

The second question is this:—

"Whether the appointment of a person whose interests are adverse to those of the minor as his guardian-*ad-litem* renders the decree void against the minor or only voidable by him."

This as framed begs the very question raised by the first point because it assumes that any person in the position of the adoptive mother here had an interest which without evidence or further consideration must, *ex hypothesi*, be adverse to the interests of the minor. In our opinion it would be premature to decide this as an abstract question of law without a finding on a decision of fact directed to the express point that the interests of this guardian-*ad-litem* were adverse to those of the minor. At present all we have is the fact that a Court appointed her, which is *prima facie* a judicial expression of opinion that her interests were not adverse. The learned Judge, we presume, was aware of, or his attention was drawn to, the provisions of Order 32, Rule 3, and he must have known the sole fact which is placed before us, namely, that the proposed guardian-*ad-litem* was herself the executant of the document. It may be that he failed to exercise a judicial discretion in coming to the conclusion that it was a proper step to appoint her, and that an Appellate Court might have so found if invoked on the ground that on the materials before the learned Judge who appointed her there was everything to show that she was unfit and nothing to show that she was fit. That has not been done. In these circumstances, we cannot see our way to answer the second question any more than the first as involving a mere point of law.

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Still less is it possible at this stage to deal with the third question put up whether objection could be taken in execution that the decree is void, because that would depend on the determination of the other two questions which we have held not to be questions of law but to require decisions of fact which do not exist.

N.S. *Reference not answered on the ground that the questions referred are questions of fact.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Pedda Tirumalingadu and another .. *Accused* in Calendar Case No. 63 of 1927, Sessions Court, Kurnool Division.*

Pedda Tirumalingadu, *In re.*

Penal Code (XLV of 1860), S. 300—Death sentence—Legality of—Two or more people banding themselves together for committing murder—Uncertainty as to which of them delivered the mortal blow.

The view that, where two or more people band themselves together for the express purpose of taking a man's life, it is not right to pass the death sentence, unless you can put your finger on the accused who delivered the particular blow that is to be regarded as mortal, is wholly erroneous.

D. A. Krishna Variar for accused.

The Public Prosecutor on behalf of the Crown.

The Court made the following

Coutts Trotter, C. J.

ORDER. *The Chief Justice.*—In this case two men who are brothers were tried for the murder of a man called Narasingadu on the 21st October last. The motive for the murder is plain enough. The elder brother, the 1st accused, had obviously been engaged in traffic in illicitly distilled arrack. The deceased man who was an official and not a mere intermeddler with other people's affairs gave information some time in September that the 1st accused was engaged in this illicit business. Thereupon the Sub-Inspector of Excise, Mr. Luke, searched the 1st accused's house and found in it quite a substantial quantity of illicitly distilled arrack. For that the 1st accused was prosecuted and convicted and the case was pending at the time of this man's murder. He disappeared on the afternoon of the 21st which was a Friday. The 2nd accused is alleged to have had a sepa-

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*Cr.R.C. No. 411 of 1928. (Taken up No. 36 of 1928). 14th August, 1928.

rate sexual motive but, in view of the fact that he and his brother were both seen on the scene of the murder standing by the dead man's body, it is not really necessary to go into that question. The little boy Kasigadu called as P.W. 9 gives a very clear story of what he heard and saw. He heard a gun shot on the Friday when he was grazing some cattle. He went in the direction of the place where he heard the shot fired and met the 2nd accused's wife and put a question to her which she did not answer. He went on a little further and there he saw the deceased man lying in the bed of a channel covered with blood. Close by him was the 2nd accused with a gun in his hand and behind the 2nd accused stood the first. The boy had fever that night and when he went home he did not report what he had seen to his parents. His explanation which the learned Judge entirely accepted was that having seen the obviously murdered body of a Talayari at the feet of these assassins he was terrified as to what might happen to himself. But next day when it became the subject of discussion that this deceased man was missing, he suggested to his parents that they should search the Edurla Venka that was near. There this man's body was found. It had been horribly mauled and half eaten away by wild beasts so much so that when the surgeon made his *post mortem* a day later, it was found that practically all the intestines and many other parts of the body had been devoured. But enough was left to show this, that a bullet had gone through the body fracturing the sixth and seventh ribs on its way and that bullet was afterwards found in the bed of the channel; also that the man's skull had been fractured, a fracture which was clearly caused by an axe which was found lying near his body which apparently belonged to himself. The probability is he was shot first and then what was to be the *coup de grace* was a blow with the axe. It is reasonably clear—not that in the light of what I am about to say it matters very much—that it was probably one person who fired the shot and the other who gave the blows with the axe. On the boy's information when the police examined him these two men were arrested and put on their trial for murder. The learned Judge convicted them of murder but abstained from passing the death penalty. Mr. Justice Devadoss who perused the calendar has put this case up to us for enhancement in order that we should consider whether these men should be sentenced to death. The course is one which, speaking for myself, I extremely dislike unless I feel myself constrained to adopt it. When a man has once been on trial for his life and has escaped with his life, it is

Pedda Tirumalingadu. *In re.*

Coutts Trotter, C. J.

obviously a very serious step to take away that life on appeal except in an extreme case. I regret to say that this is clearly an extreme case. It was a horrible murder from the most sordid of motives and I am at a loss to understand what induced the learned Judge to adopt the course he did. But he has given his reasons and I think it best to set them forth. He says this at the end of his judgment:

"As regards the sentence I take into consideration the fact that it is not clear which of the accused fired the gun and who cut the deceased man on the head with an axe."

. . . . as if that matters.

"The medical witness says that Narasingadu should have died owing to shock on account of the fractures of the skull and the ribs. It appears to me that the fatal wounds were those of the head as it is rarely that a man succumbs by the mere fracture of his two ribs."

As to that the question is not merely as to the fracture of the ribs but what lesions were caused to the tissues inside and the vital organs after the bullet has passed the fractured ribs on its way through the body to go out the other side as we know it did.

"The evidence does not show which accused it was that caused the fracture to the skull. In view of these considerations I sentence both the accused to transportation for life."

I very much regret to say that there are quite a number of Acting Sessions Judges in this Presidency who appear to labour under the delusion that, where it is clear that two or more people banded themselves together for the express purpose of taking a man's life, it is not right to pass the death sentence, however horrible the circumstances, unless you can put your finger on the accused who delivered the particular blow that is to be regarded as mortal. That is a complete illusion and would be cured by a perusal of any elementary text-book on Criminal Law. This case is so horrible that I feel constrained to take the course which I dislike, namely, of directing that these sentences be enhanced and the accused be sentenced to death.

Pakenham Walsh, J.

Pakenham Walsh, J.—I agree with my Lord the Chief Justice. I myself do not like enhancing of sentence in these cases unless it appears to be absolutely called for. But in this case I think the murder is such a brutal one that we have no other course but the one we adopt.

A.S.V. *Sentences enhanced. Accused sentenced to death.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE TIRUVENKATACHARIAR.

Nageswara Aiyar *alias* Ramasami Aiyar .. *Appellant** (*Petnr.*)

v.

M. L. M. Ramanathan Chettiar .. *Respondent* (*Respt.*)

Letters Patent (*Madras*), *clause* 15—*Preliminary decree in mortgage suit—Appeal—Order staying further proceedings on terms—Appeal by judgment-debtor—Maintainability—Mortgage suit—If ends with the preliminary decree.*

Nageswara Aiyar v. Ramanathan Chettiar.

No appeal lies at the instance of the judgment-debtor, under clause 15 of the Letters Patent, against an order directing stay of further proceedings on terms in an appeal preferred against the preliminary decree in a mortgage suit.

Tuljaram Row v *Alagappa Chettiar,* (1910) I.L.R. 35 Mad. 1: 21 M.L.J. 1 (F.B.) referred to.

Sonachalam Pillai v. *Kumaravelu Chettiar,* (1923) I.L.R. 47 Mad. 316: 46 M.L.J. 138; *Govindaramanuja Pedda Jeeyangarlavaru* v. *Krishnamacharlu,* (1926) 52 M.L.J. 161 and *Pethaperumal Chettiar* v. *Chidambaram Chettiar,* (1927) 52 M.L.J. 670 distinguished.

A mortgage suit does not finally come to an end with the passing of the preliminary decree.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Curgenven, dated 26th September, 1928 in C.M.P. No. 2644 of 1928 (Petition praying for stay of further proceedings in O.S. No. 70 of 1927, Court of the Subordinate Judge of Madura) in A.S. No. 213 of 1928 preferred to the High Court against the decree of the Court of the Subordinate Judge of Madura in the said O.S. No. 70 of 1927.

K. S. Venkataramani for appellant.

C. A. Seshagiri Sastri for *T. M. Ramaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT.—This is a Letters Patent Appeal against an order of Curgenven, J., ordering a stay of further proceedings in the suit on terms. The suit is a mortgage suit and a preliminary decree has been passed and an appeal against it preferred to this Court. Stay of further proceedings pending the hearing of the first appeal was asked for by the appellant and granted by the learned Judge on terms. Appellant is the judgment-debtor under the decree and he objects to the terms imposed by the

*L.P. Appeal No. 46 of 1928. 7th November, 1928.

Nageswara Aiyar v. Ramanathan Chettiar.

learned Judge as being too onerous and presents this Letters Patent Appeal on that ground.

A preliminary objection is taken by the respondent decree-holder that the appeal does not lie. We think the objection must be sustained. The interpretation of 'judgment' in cl. 15 of the Letters Patent which is given by the learned late Chief Justice Sir Arnold White in *Tuljaram Row* v. *Alagappa Chettiar*[1] has, in this Presidency at least, been followed so consistently that it has become for all practical purposes settled law here and we can see no reason for departing from that interpretation. The test there given is, where the order is in the course of the suit or proceeding, does it in effect put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned; and if the order is on an independent proceeding which is ancillary to the suit, it should be in some proceeding taken with a view to rendering the judgment effective, if obtained. The learned Chief Justice also dealt with orders and petitions for stay of execution and said that he would be prepared to hold that an appeal would lie from an order refusing a stay of execution.

Now clearly none of these tests will apply to the present case. The suit itself has not yet come to an end. We are not prepared to accept the argument of the appellant that a mortgage suit has finally come to an end with the passing of a preliminary decree. That is contrary to the scheme of the present Civil Procedure Code. So far from the preliminary decree putting an end to the suit, execution cannot begin until after the final decree is passed and the property cannot be put up for sale until then. The appellant's petition which was heard by the learned Judge was designed to stay a sale of the property and it can equally be put in after the passing of the final decree. The order under appeal itself is obviously not a final order putting an end to the proceedings; it merely adjourns the suit if the appellant complies with its terms, and, if he does not, the suit goes on.

The appellant is unable to quote any ruling in his favour. Cases in which an appeal has been allowed in execution matters are appeals against orders refusing to stay execution. See *Sonachalam Pillai* v. *Kumaravelu Chettiar*,[2] *Govindaramanuja Pedda Jeeyangarlavaru* v. *Krishnamacharlu*[3] and *Pethaperumal*

1. (1910) I.L.R. 35 M. 1: 21 M.L.J. 1 (F.B.).
2. (1923) I.L.R. 47 M. 316: 46 M.L.J. 138.
3 (1926) 52 M.L.J. 161.

Chettiar v. *Chidambaram Chettiar*.[4] These are not in point. Here there is no refusal to stay execution. Execution has been stayed on terms, and the appellant is dissatisfied only by the terms imposed. The order puts an end, therefore, neither to the suit nor to any request for stay of execution. We, therefore, hold that no appeal lies and dismiss this appeal with costs.

Nageswara Aiyar v. Ramanathan Chettiar.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, AND MR. JUSTICE ANANTHAKRISHNA AIYAR.

Mir Hyder Ali Sahib .. *Appellant** (*Plff.*)

v.

Amirudin Sahib and others .. *Respondents* (*Defts.*).

Mir Hyder Ali Sahib v. Amirudin Sahib.

Limitation Act (IX of 1908), Arts. 11 (a), 13, 120 and 144—Ejectment proceedings under Chapter VII of Presidency Small Cause Courts Act—Order by Court—Subsequent dismissal of application for possession on account of obstruction—Suit in City Civil Court to recover possession on strength of title—Limitation.

The plaintiff applied to the Small Cause Court, under Chapter VII of the Presidency Small Cause Courts Act, to direct the first defendant to deliver possession of the properties to him on the allegation that he was his tenant and that the tenancy had been determined by notice to quit. The Court passed an order as prayed for. The plaintiff applied for possession, but, when the bailiff went to deliver possession, he was obstructed by defendants 2 and 3 who set up rights in themselves. The Court thereupon dismissed the plaintiff's petition for possession. The plaintiff then filed a suit in the City Civil Court against the three defendants to recover possession of the properties on the strength of his title.

Held (1) that the suit was not governed by Art. 11 (*a*) of the Limitation Act, as proceedings under Chapter VII of the Presidency Small Cause Courts Act cannot be said to be a 'suit,' nor the decision passed in such proceedings a 'decree' within the meaning of the Civil Procedure Code.

Krishnaswami Chetty v. *Natal Emigration Board*, (1893) I.L.R. 17 Mad. 216: 4 M.L.J. 70, *Doraiswami Aiyangar* v. *Narayana Aiyangar*, (1922) 43 M.L.J. 288, and *Manicka Chetty* v. *Kuppuswami Naicker*, (1926) 25 L.W. 115 referred to.

Ramachandra Rao v. *Ramachandra Rao*, (1922) L.R. 49 I.A. 129: I.L.R. 45 Mad 320: 43 M.L.J. 78 (P.C.) distinguished.

(2) that the suit was not governed by Art. 13 of the Limitation Act, as it could not be said to be one to 'alter or set aside' the decision or order in the ejectment proceedings passed by the Small Cause Court in which there could be no enquiry or adjudication with reference to the title of the parties. *Laknarain Singh* v. *Rahee Nunja Koer*, (1867) 7 W.R. 199 applied; and

(3) that the proper article of the Limitation Act applicable would be Art. 120 or Art. 144.

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*C.C.C.A. No. 4 of 1926. 9th December, 1927.

4. (1927) 52 M.L.J. 670.

Mir Hyder Ali Sahib v. Amirudin Sahib.

Appeal against the decree of the City Civil Court, Madras, dated 28th September, 1925 in O.S. No. 217 of 1924.

M. S. Venkatarama Aiyar for appellant.

K. S. Jayarama Aiyar for respondents.

The Court delivered the following

Ananthakrishna Aiyar, J.

JUDGMENTS. *Ananthakrishna Aiyar, J.*—The plaintiff is the appellant in this appeal. On the allegation that the first defendant was the plaintiff's tenant, and that the tenancy had been determined by notice to quit, the plaintiff applied to the Madras Court of Small Causes by Petition No. 17 of 1921 under Chapter VII of the Presidency Small Cause Courts Act to direct the defendant to deliver possession of the properties to the plaintiff. The Court passed an order directing the 1st defendant to vacate the premises by the 26th of March, 1921 and ordered that, in default, possession would be delivered through Court on 31st March, 1921. Then the plaintiff took out a warrant for possession (M.P. No. 715 of 1921) and when the bailiff of the Court of Small Causes went to the premises to deliver possession to the plaintiff he was obstructed by defendants 2 and 3 who set up right in themselves and also denied tenancy under the plaintiff. Thereupon the Court dismissed the plaintiff's Petition No. 715 of 1921 on 28th October, 1921. The plaintiff accordingly filed Original Suit No. 217 of 1924 on the file of the City Civil Court, Madras, on 25th April, 1924 against the three defendants to recover possession of the property on the strength of his title and also claimed mesne profits. Defendants 2 and 3 contested the suit raising among other pleas the plea of limitation. Issues 4 and 7 ran as follows:—

Issue 4.—Is the suit barred under Order 21, Rule 63 of the Civil Procedure Code?

Issue 7.—Is the suit barred by limitation?

The learned City Civil Judge dismissed the suit holding that the suit was barred by limitation, and he did not try the merits of the case. The question that arises for decision in this appeal is whether that decision is correct.

The line of argument pursued by the learned City Civil Judge may be stated in his own words:

"The Small Cause Courts Act expressly provided in section 48, under Chapter VII headed 'Recovery of possession of immoveable properties,' that in all proceedings under that Chapter the Small Cause Courts shall, as far as possible, and, except as hereinafter otherwise provided, follow the procedure prescribed for the Court of the first instance by the Civil Procedure Code. Though in general, therefore, the Civil Procedure Code may not be applicable to the Small Cause Courts unless and until its provisions

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are reproduced in the Small Cause Courts Act or in the rules made thereunder, an exception is made with reference to Chapter VII of the Small Cause Courts Act. Under that Chapter, then, the Civil Procedure Code is expressly declared as the Act to be followed, and it is a well-known practice of the Small Cause Court that Rules 98 to 103 of Order 21 of the Civil Procedure Code are constantly invoked and actually enforced in the Small Cause Court as often as they are in the City Civil Court. . . . . Therefore, Rules 262 to 267 corresponding to Rules 98 to 103 of Order 21, Civil Procedure Code, are still applicable to the Small Cause Court. The only other contention that was put forward was the age-long argument that an ejectment application made in the Small Cause Court is a different thing from a suit and an order passed therein is a different thing from a decree and, therefore, Art. 11 (*a*) of the Limitation Act does not apply to such a suit. Though such a proceeding is called 'an application' and the decision made in it is called an order, the said order corresponds and answers more to the description given of a 'decree' in the Civil Procedure Code than to the term 'order.' It is the final adjudication of the litigation pending before the Court. What we are directly concerned with now is not a decree of a Civil Court terminating a suit or a decision of the Small Cause Court similarly terminating a suit but an order subsequently made in execution proceedings in connection with an obstruction raised. The said order whether made by a Court of Original Jurisdiction like the City Civil Court or promulgated by the Small Cause Court is in both cases passed under the Code of Civil Procedure and is the order expressly referred to in Art. 11 (*a*) of the Limitation Act and it is in respect of such orders that a period of one year is fixed. . . . There is no reason for drawing hair-splitting distinctions between an order in obstruction proceedings made in the Small Cause Courts and exactly similar order made in the same class of suits in the City Civil Court and not those passed by the Small Cause Court I find that Article 11 (*a*) of the Limitation Act applies and that plaintiff's suit for possession which has been brought more than one year from the date of that order is therefore out of time and is consequently liable to be dismissed."

Mr. M. S. Venkatarama Aiyar, the learned Vakil for the appellant, argued that the learned City Civil Judge was wrong in his reasoning on the question of limitation and that Art. 11 (*a*) was inapplicable to the case. We agree with his contention. Before Art. 11 (*a*) of the Limitation Act could be invoked it should be shown that there was "a decree for possession of immoveable property" or that immoveable property was "sold in execution of a decree." Decree is defined in section 2 (ii) of the Civil Procedure Code as the formal expression of an adjudication . . . . . conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit. Therefore without a "suit" there could not be a decree within the definition of the Code. Now we have to consider whether the proceedings taken under Ch. VII of the Presidency Small Cause Courts Act could be said to be a suit and the decision of the Court thereon could be said to be a decree within the meaning of the Civil Procedure Code. Section 41 of the Presidency Small Cause Courts Act enacts

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that a person may apply to the Court for a summons against the occupant under certain circumstances; . . . . that person is called the applicant. Sections 45 and 46 speak of a suit which could be instituted by any person deeming himself aggrieved by the acts of the applicant, and section 47 uses the word application with reference to proceedings taken under S. 41 in contradistinction to suits. Section 19 of the Act enacts that the Small Cause Courts shall have no jurisdiction in suits for recovery of possession of immoveable properties and in suits for the determination of any other right or interest in immoveable property. Finally, section 49 provides. . . .

"Recovery of the possession of any immoveable property under this Chapter shall be no bar to the institution of a suit in the High Court for trying the title thereto."

The recent amendment effected by Madras Act III of 1927 gives jurisdiction to the City Civil Court also to try such suits. The provisions of the Act thus make it clear that proceedings under Ch. VII of the Act do not constitute a suit within the meaning of the Code and that decisions passed under that Chapter are not decrees within the meaning of the Civil Procedure Code.

The matter is also concluded by decided cases. In *Krishnaswami Chetty* v. *Natal Emigration Board*[1] Sir Arthur Collins, C.J., and Shephard, J., held that an application under Ch. VII was not a suit within the meaning of section 22. In *Doraiswami Aiyangar* v. *Narayana Aiyangar*[2] the present learned Chief Justice, sitting with Ramesam, J., says as follows:

"What is cognizable by the Small Cause Court is merely an application. Order 6, Rule 3 of the rules for the Presidency Small Cause Courts no doubt says that an application under S 41, Presidency Small Cause Courts Act shall be in the form of a plaint, but on this ground the application does not become a suit"

The matter is fully discussed by the learned Chief Justice in the recent case reported in *Manicka Chetty* v. *Kuppuswami Naicker*.[3] After stating that the Small Cause Courts Act deliberately provided for summary remedy for possession without prejudice to questions of title in a higher tribunal, the learned Chief Justice proceeded to state as follows:

"It is clear to my mind that proceedings under Chapter VII of the Small Cause Courts Act are not suits within the meaning of Act V of 1916 Indeed language is carefully chosen to indicate that they are not suits but summary orders which can be enforced without prejudice to the result of suits properly so described."

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1 (1893) I.L.R. 17 M. 216: 4 M.L.J. 70.
2 (1922) 43 M.L.J. 288.
3. (1926) 25 L.W. 115

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This is the view that has been held by the Bombay High Court also. See *Ramakrishna* v. *Haji Dawood*,[4] *Framroz Dosabhai* v. *Dalsukhbhai Fulchand*[5] and *Bai Meherbhai* v. *Pherozshaw Sorabji*.[6]

The learned vakil for the respondent contended that it did not matter how the proceedings arose whether by an application or by a plaint and relied on the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[7] where their Lordships held that the decision by the Court of a dispute as to the title to receive compensation money under the Land Acquisition Act rendered the question of title *res judicata* in a subsequent suit between the parties to the dispute. But a reference to the judgment of their Lordships makes it clear that that decision has no bearing on the present case. At page 330 their Lordships observe as follows:

"How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board. . . . It is not competent for the Court, in the case of the same question arising between the same parties to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in due time."

It is clear that the decision is relevant only to a plea of *res judicata* and has no bearing on the present case where there is no plea of *res judicata*.

We must therefore hold that the proceedings instituted under Chapter VII of the Presidency Small Cause Courts Act are not "suits" within the meaning of the Civil Procedure Code. Consequently having regard to the wording of Art. 11 (*a*) of the Limitation Act, the said Art. 11 (*a*) could not be held to bar the present case.

But Mr. K. S. Jayarama Aiyar, the learned Vakil for the respondent, wanted to support the decree of the Lower Court dismissing the suit on another ground, namely, that the proper article of the Limitation Act applicable to the present case is Art. 13 and that the suit should be held to be barred under that article though the applicability of that article was not discussed by the Lower Court.

Art. 13 of the Limitation Act provides a period of one year for a suit to alter or set aside a decision or order of a Civil Court in any proceedings other than a suit, the time from

4. (1907) I.L.R. 31 B 259. 5. (1920) I.L.R. 45 B. 972.
6. (1927) I.L.R. 51 B 885.
7. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320; 43 M.L.J. 78 (P.C.).

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which the period is to commence being the date of the final decision or order in the case of a Court competent to determine it finally. After consideration, we have come to the conclusion that Art. 13 could not apply to the present suit. In the first place it could not be said that the present suit is "to alter or set aside" a decision or order within the meaning of that article. As pointed out in *Manicka Chetty* v. *Kuppuswami Naicker,*[3] the Small Cause Courts Act deliberately provides for summary remedies for possession without prejudice to the trial of questions of title in a higher tribunal.

In this connection we may refer to the distinction that exists between orders passed under Order 21, Civil Procedure Code dealing with objections raised to the attachment of properties and those relating to resistance to the delivery of possession on the one hand, and orders passed under Ch. VII, Presidency Small Cause Courts Act on the other. With reference to orders passed under Order 21, Civil Procedure Code mentioned above, there is an enquiry and adjudication however summary of the rights of parties. *See* Order 21, Rules 59 and 63 and Rules 99 and 101, whereas as regards orders passed under Ch. VII of the Presidency Small Cause Courts Act there is neither enquiry nor adjudication with reference to the title of the parties.

There could be no decision or order by the Small Cause Court relating to the question of title, and consequently in the present suit which is brought to try the question of title there is no necessity to alter or set aside any decision or order passed under Ch. VII. It should also be noticed that section 49 of the Act provides that

"recovery of the possession of any immoveable property under this Chapter (Ch. VII) shall be no bar to the institution of a suit in the High Court for trying the title thereto."

In the face of the provisions of that section, it is difficult to hold that the present suit should be considered as one to alter or set aside a decision or order in any proceeding under Ch. VII of the Act. We may refer to the case of *Pearson* v. *Glasebrook,*[8] where Martin, B., observed as follows at p. 29:

"It seems to me that the Act (19 and 20 Vic. 108) shows on the face of it that it applies only to a clear case of landlord and tenant. A summary remedy is given to the landlord; but if it turns out that there is reasonable ground for supposing that a question of title will arise, the power and jurisdiction of the County Court is gone."

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3. (1926) 25 L.W. 115 at 117. 8. (1867) L.R. 3 Ex. 27.

Pigott, B., said:

"The County Court Judge being of opinion that a question of title arose declined to adjudicate I think the Judge has gone exactly to the right point. Having heard the claim and the defence of the respective parties, the Judge comes to the conclusion that a question of title is involved; and if he had proceeded further he must have tried and determined a question of title and not a mere question of landlord and tenant"

It follows, therefore, that as the Presidency Small Cause Court in proceedings under Ch. VII had no jurisdiction to decide questions of title, none of the orders passed under Ch. VII could be regarded as a "decision or order" on the question of title and there being in law no "decision or order" on the question of title, there is no necessity in the present suit to alter or set aside any such decision or order and consequently Art. 13 of the Limitation Act has no application and does not bar the present suit.

Reference may be made to the decision of the Privy Council reported in *Shankar Sarup* v. *Mejo Mal.*[9] Under section 295, Civil Procedure Code, proceeds of execution sale are to be divided rateably among decree-holders; but the section provides:

"If all or any such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

It was contended that Art. 13 of the Limitation Act applied to the suit contemplated by that section. The Privy Council overruling the contention observed as follows:

"It is to be observed that the same section of the Civil Procedure Code which authorised the order for payment to Lalachand authorises also the present suit by the appellants The 295th section, while providing that the Judge under whose authority the sale takes place shall distribute the proceeds, provides also that if all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. It seems to their Lordships, therefore, that the present suit is in no sense an action to set aside the order of distribution of the 7th February, 1888 and that the order does not stand in the way of the present suit. The scheme of section 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seemed at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights which may be subsequently readjusted by a suit such as the present."

A Full Bench of the Calcutta High Court decided in *Laknarain Singh* v. *Ranee Nunja Koer*[10] that

"a summary order made under Act XIX of 1841 and intended only to affect the question of possession did not operate as a bar to a regular suit to try the title and that such suits might be brought within 12 years."

It was therefore argued that cl. 5 of S. 1 of the Limitation Act XIV of 1851 (which provided a period of one year for

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9 (1901) L.R. 28 I.A. 203: I.L.R. 23 All. 313 at 322 (P.C.).

10. (1867) 7 W.R 199: Beng. L. R. (Sup.) 633 (F.B.).

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"suits" to alter or set aside summary decisions or orders of any character the period of one year to commence from the date of the final decision, award, or order in the case) applied to the suit brought to try the question of title. Sir Barnes Peacock, C.J., in delivering the judgment of the Full Bench observed as follows:

"Section 17 of Act XIX of 1841 provided that nothing in that Act contained shall be any impediment to the bringing of a regular suit either by the party whose application may have been rejected, before or after citing the party in possession, or by the party who may have been evicted from the possession under the Act. If the summary order made under the Act is to be no impediment to bringing a regular suit there is no necessity for setting aside that order Then the question is within what time is the regular suit to be brought to try the title to land and to be put into possession of it? That summary order cannot be pleaded or set up as a bar to the maintenance of the suit to try the title and to be put into possession under that title Clause 12, section 1 of Act XIV of 1859 fixes the period of limitation in suits for the recovery of immoveable property or of any interest to immoveable property to which no other provision of that Act applies at 12 years. We think then that the period of limitation applicable in such a suit as this is 12 years and not one year"

We think that the reasoning of that Full Bench decision would apply equally to the present case.

The appellant's vakil referred to section 9 of the Specific Relief Act as analogous to section 49 of the Presidency Small Cause Courts Act. He argued that section 9 of the Specific Relief Act to the effect that nothing in that section shall bar any person from suing to establish his title to such property and to recover possession thereof was similar to section 49 of the Presidency Small Cause Courts Act. He contended that a suit contemplated by section 9 of the Specific Relief Act was governed by the 12 years rule (Mitra on Limitation, Vol. II, page 895, 5th Ed.). Similarly, he urged that the present suit also should be held to be governed by the 12 years rule. But that argument does not help us in the construction of Art. 13 of the Limitation Act, since Art. 13 could not possibly apply to a suit contemplated by section 9 of the Specific Relief Act. Stress was also laid on behalf of the appellant on the wordings of the third column of Art. 13, namely, "the date of the final decision or order in the case by a Court competent to determine it finally." The words "by a Court competent to determine it finally" were inserted by Act IX of 1871, evidently owing to the decision of the Calcutta High Court in *Musammat Obea Unnissa* v. *Baldeo Narain Singh*.[11] Sir Barnes Peacock, C.J. and Bayley, J., there held that the final decision or order contemplated by clause 5, section 1 of the Limitation Act XIV of 1859 was a final decision of the

11. (1867) 7 W.R. 151.

Court which had competent jurisdiction to determine the case finally and not the order of a Court superior to such Court dismissing an appeal from the decision of such Court for want of jurisdiction. It should also be noted that the words in question were added by Act IX of 1871, and the subsequent Limitation Acts not to column one of the article but to the third column which relates to the time from which period begins to run. No decisions of any High Court holding that either Art. 11 (*a*) or Art. 13 applied to a suit like the present was brought to our notice. The present suit is in time whether the proper article applicable be Art. 120 or Art. 144.

No doubt, the policy of the law would seem to be to prescribe only a short period of limitation for re-opening summary adjudications by means of a fresh suit. While fully alive to the said considerations we cannot lose sight of the fact that in cases like the present there is no adjudication at all of the title of the parties. The principle accordingly would not seem to apply to suits like the present. On the other hand we have the decision of the Full Bench of the Calcutta High Court (*Laknarain Singh* v. *Ranee Nunja Koer*[10]) passed in 1867 to the effect that the period of limitation applicable to similar suits is the ordinary period of twelve years, and so far as we are aware that view has not been questioned. On the other hand West and Nanabai Haridas, JJ., followed the said decisions in *Babaji* v. *Anna*[12] See also *Sivaji Yesji Chawan* v. *The Collector of Ratnagiri*.[13] We are accordingly of opinion that the decision of the learned City Civil Judge on the question of limitation cannot be supported. The appeal is accordingly allowed and the decree of the Lower Court reversed and the suit remanded for disposal according to law. All costs hitherto to abide the result. Court-fee paid on the memorandum of appeal to be refunded to the appellant.

Coutts Trotter, C.J.—I agree.

N.S. *Appeal allowed.*

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10 (1867) 7 W.R 199 Beng. L R. (Sup) 633 (F.B).
12 (1873) 10 Bom. H. C R 479.
13. (1886) I.L.R. 11 Bom. 429 at 432

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Perianna Muthirian .. *Petitioner* in Cr.R.C. No. 186 of 1928—Appellant in Cr.A. No. 142 of 1928 (Complainant)*

v.

M. Vengu Aiyar and others .. *Respondents (Accused).*

Perianna Muthirian *v.* Vengu Aiyar.

Criminal Procedure Code (V of 1898), S 209—Discharge of accused—Grounds—Legal bar to prosecution—Criminal Procedure Code, S. 195 (b)—Offence under section 193, Indian Penal Code, also amounting to forgery——Complaint of—Sanction required by clause (b)—Necessity—Complaint naming offence as forgery—Effect—Forgery by persons one of whom party to proceeding in Court in which document is produced—Remaining persons not parties to proceeding—Prosecution of—Sanction under Ss. 195 or 476—Necessity—S. 476-A, Criminal Procedure Code—Discretion of Lower Court under—Interference with

Where the facts stated in a complaint disclose an offence under S. 193, Indian Penal Code, committed in relation to a proceeding in Court, no Court can, under S 195 (b), Criminal Procedure Code, take cognizance of such an offence otherwise than in the manner prescribed by the said clause, and it makes no difference that the complainant, to evade that provision, elects to name the offence of forgery in his petition. The specific offence of fabricating false evidence should be given a preference over the more general offence of forgery.

Quaere. Whether an offence of forgery is committed by more than one person, one at least being a party to a proceeding in Court in which the document is produced, such participants in the forgery as are not parties to the proceeding may be prosecuted otherwise than under the provisions of sections 195 and 476, Criminal Procedure Code.

Where the Lower Court appears to have reasonably exercised its discretion not to take action under S 476-A, Criminal Procedure Code, that discretion should not be lightly interfered with.

If at any stage the Court finds a legal bar to the prosecution of the accused it acts rightly in discharging them.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of the Trichinopoly Division, dated 20th December, 1927 and passed in Criminal Revision Petition No. 24 of 1927 praying that the Sessions Court may be pleased to revise the order of discharge of the accused, passed in Calendar Case No. 61 of 1927 on the file of the Court of the Sub-divisional 1st Class Magistrate, Musiri, and appeal against the order

*Cr R.C. No. 186 of 1928. (Cr.R P. No 138 of 1928) and Cr.A. No 142 of 1928. 11th September, 1928.

Perianna Muthirian v. Vengu Aiyar.

of the Court of the Session of the Trichinopoly Division, dated 20th December, 1927 and passed in Cr.M.P. No. 56 of 1927.

V. L. Ethiraj, M. S. Vaidianatha Aiyar and *T. S. Srinivasan* for petitioner.

T. M. Krishnaswami Aiyar and *K. S. Jayarama Aiyar* for *M. Subbaroya Aiyar* for respondents.

K. Venkataraghavachariar for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—These are respectively a Criminal Revision Petition and a Criminal Appeal arising out of certain proceedings (M.C. No. 24 of 1926) under section 145, Criminal Procedure Code, taken before the Sub-divisional Magistrate of Musiri. The petitioner and appellant here, Perianna Muthirian, alleged possession of the immoveable property in dispute as lessee of certain persons holding it as trust property. His possession was challenged by the agents and lessee of one P. M. A. Muthia Chetti, who had purchased the land at a Court sale. For the purpose of these proceedings it is unnecessary to enter more fully into the circumstances leading up to the possession case. The petitioner impleaded as counter-petitioners in that case eight persons, of whom only the first two need be here mentioned, Narayanaswami Aiyar described as an agent of the Chetti, and Kothandapani Nadan, the Chetti's lessee. The petitioner's case was that on 5th June, 1926, Narayanaswami Aiyar came to the land with a body of men and disturbed the possession which he had enjoyed for some time past. The case for the counter-petitioner was that the Chetti had obtained possession on 17th April, that Kothandapani Nadan had on 24th May signed an agreement to take a lease of the lands and had on that day entered into possession; and that on 4th June a formal lease-deed had been executed. We are concerned here with the agreement to lease, or *Varthamanam* (Ex. VIII) which the petitioner denounces as a forgery. It was got up, according to him, after the police had made their local inquiry on 10th June, and because the counter-petitioners' party had to account for seedlings obviously sown before the date of the lease-deed. This document purports to have been executed by Kothandapani Nadan to Narayanaswami Aiyar, to have been written and attested by one Ratnam Pillai and to have been attested by one Alagiri Rajah. The petitioner asserts that besides these participants, two other persons conspired to fabricate it, Vengu Aiyar, who

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is another of the Chetti's agents, and N. Ramaswami Aiyar, the High Court Vakil, who conducted the counter-petitioners' case.

On 16th April, 1927, while the possession case was still going on, the petitioner filed a complaint before the District Magistrate of Trichinopoly against Vengu Aiyar and N. Ramaswami Aiyar of abetment of forgery. The District Magistrate transferred the complaint to the Sub-divisional Magistrate of Musiri, who decided to dispose of the possession case before proceeding with it. As soon as that was done he took a sworn statement from the complainant and issued process. In response, the two accused persons filed what they term a "statement of objection," adducing grounds why they should be discharged without further inquiry; and the Sub-divisional Magistrate accepting those grounds, or some of them, in an order, dated 26th September, 1927, discharged the accused under S. 253 (2), Criminal Procedure Code. An application to the Court of Session, Trichinopoly, to revise that order was unsuccessful, and a further attempt is now being made here to upset it by means of the revision petition under disposal. The Criminal Appeal is preferred against an order of the Sessions Judge declining to proceed against Narayanaswami Aiyar and the two counter-petitioners to the revision petition under section 476-A, Criminal Procedure Code.

Dealing first with the Criminal Revision Petition, Mr. Ethiraj for the petitioner concedes, as is indeed indisputable, that if at any stage the Court found a legal bar to the prosecution of the accused it was acting rightly in discharging them. The burden of establishing such a bar rests upon the counter-petitioner's, and it is argued that it is created in two separate ways by the terms of section 195, Criminal Procedure Code—under clause (*b*) of sub-section (1) and also under clause (*c*).

Under clause (*b*) no Court shall take cognizance of any offence punishable under certain sections of the Penal Code, including section 193,

"when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate."

The contention is that although the complaint alleged an offence of abetment of forgery, and although the circumstances adduced in support of that allegation might, if proved, substantiate such an offence, yet they would also substantiate nothing more and nothing less than the offence of abetting the fabrication of false evidence in relation to the proceedings under S. 145, Cri-

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minal Procedure Code, before the Sub-divisional Magistrate, so that under clause (*b*) the only complaint upon which a criminal case could be founded would be that of the Sub-divisional Magistrate himself, or of his superior Court.

That the terms of the petitioner's complaint do bear the construction sought to be placed upon it is clear, I think, from its general tenor and in particular from the opening sentence of paragraph 7, which runs as follows:

"The two accused conspired with the said Narayanaswami Aiyar to forge Ex. VIII and forged it with the deliberate object of using it in the above proceedings in the Court of the 1st Class Magistrate, Musiri, and other proceedings that might follow; and used it on 18th December, 1926 before the said Court, when Kothandapani Nadan was examined."

This is a clear assertion that the document was forged for the express purpose of affording evidence in the possession case—that that was the immediate object of the two accused among others. It is evident, therefore, that the offence complained of was one of the class named in clause (*b*). Not only so, but the act imputed to the accused did not comprise any elements over and above those which are needed in a case where, as here, the fabricated evidence takes the shape of a document—to satisfy the definition of fabricating false evidence contained in S. 192, Indian Penal Code. The relevant portions of that definition run thus:

"Whoever . . . . makes any document containing a false statement intending that such . . . . false statement may appear in evidence in a judicial proceeding . . . . and that such . . . . false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding is said to fabricate false evidence."

Whether or not the preparation of such a document with such an intention necessarily and invariably amounts also to the offence of forgery, I think that this result follows in all ordinary cases; and the consequence of accepting the petitioner's contention, that although in such a case he is barred from prosecuting for fabricating false evidence he is still at liberty to prosecute for forgery, means that the provisions of section 195 (1) (*b*), Criminal Procedure Code, may be evaded by this simple expedient.

It has been urged that, notwithstanding this obvious objection, there is authority in support of the petitioner's claim. Three cases involving offences for the trial of which sanction is needed have been cited. I may dismiss *Tarsu Beg* v. *Muhammad Yar Khan*[1] for reasons which a perusal of it will make obvious. In *Krishna Pillai* v. *Krishna Konar*[2] the circum-

1. (1923) 21 A.L.J. 915. 2. (1907) I.L.R. 31 M. 43: 17 M.L.J. 559.

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stances which Miller, J., sitting alone, had to deal with were that an amin, accompanied by the decree-holder's agent, went to execute the decree and these persons were obstructed and assaulted. Sanction to prosecute for an offence under section 186, Indian Penal Code, was applied for and refused, whereupon the agent presented a complaint under sections 323 and 355, Indian Penal Code. The learned Judge held that since those offences could be separately charged they could be tried without sanction; but it is to be observed that they, and especially the latter, were not necessarily included within the offence in respect of which sanction was necessary. To put an extreme instance, if the agent or the amin had been murdered in the course of the obstruction, it could scarcely be contended that want of sanction to prosecute under section 186 was a bar to trial upon a charge of murder. In the other case *Queen-Empress* v. *Anant Puranik*[3] the accused were convicted by an Assistant Sessions Judge of either instigating or attempting to commit dacoity and the conviction was set aside by the Sessions Judge on appeal, on the ground that the evidence disclosed an offence of waging war against the Queen (section 122, Indian Penal Code) for which sanction of Government is necessary under section 196, Criminal Procedure Code. In holding that the Assistant Sessions Judge was right and the Sessions Judge wrong, the learned Judges appear to have been much influenced by the fact that the Government had considered and abandoned the idea of according sanction because the police inquiry showed that there was no evidence to substantiate a charge under section 122. Mr. Justice Ranade indeed expresses the view that if the Government found no design to wage war established,

"it was not for the committing Magistrate to decline to frame any charge or for the Assistant Sub-Judge to refuse to inquire into the charges or which the commitment was made. . . The Sessions Judge virtually has taken on himself the function of setting his own judgment against the opinion of Government, in a matter which by law belongs properly to Government which alone under section 196 has the right to grant or refuse the sanction."

Whatever be the merits of this doctrine it is needless to say that it is incapable of application here, where the Court in respect of which the offence was committed had not been approached for sanction or, as the law now requires, moved to complain; nor, if it had been so moved, and had refused on the

3. (1900) I.L.R. 25 B 90.

ground of lack of evidence, could that very ground have supplied an argument to the Trial Court for proceeding with the complaint of forgery, because the allegations in the complaint show that if a charge of fabrication must fail a charge of forgery must also fail. It is true that Mr. Justice Ranade's judgment contains also some more general expressions of opinion, as where he doubts whether want of sanction to prosecute under S. 205, Indian Penal Code (false personation for the purpose of a suit) would bar a prosecution under section 170 or section 171 (personating a public servant or wearing garb, etc., of public servant). The latter offences of course contain an element not necessarily present in the former. But if the proposition is broadly this, that where an offence containing, say, ingredients (*a*), (*b*) and (*c*) can only be inquired into upon complaint of the Court concerned by reason of the presence of ingredient (*c*), it is yet open to a Criminal Court, upon the same allegations, to entertain a complaint of an offence containing ingredients (*a*) and (*b*) only although ingredient (*c*) is also clearly present, I must respectfully express my dissent. It is for the complainant to lay before the Court the matters of fact upon which he proposes to base his case, and it is for the Court to decide whether with reference to the provisions of the Penal Law, it is competent to entertain that case upon the facts stated. In the present instance the facts stated disclosed an offence under S. 193, Indian Penal Code, committed in relation to a proceeding in Court. S. 195 lays down that no Court shall take cognizance of such an offence otherwise than in the manner prescribed, it makes no difference, in my view, that the complainant, evidently to evade that provision, elected to name the offence of forgery in his petition.

This general view is not, I think, really in conflict with such a case as *Mahaganam Venkatrayar* v. *Kodi Venkatrayar*[4] where it was held that a conviction for simple forgery is not illegal although the facts substantiated an offence of forgery of a valuable security which the Court had no jurisdiction to try. The conviction may not have been illegal, but if the Magistrate had disclaimed jurisdiction to convict and had proceeded under S. 347, Criminal Procedure Code, assuredly he would have taken the more correct course. In *Madurai, In re*[5], a conviction under section 426, Indian Penal Code, was set aside on the ground

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4 (1922) I.L.R. 45 M. 29: 41 M.L.J. 398.
5. (1888) I.L.R 12 M. 54.

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that the special form of mischief which the evidence disclosed was specially provided for by section 477, Indian Penal Code; and in *Setti Rangayya* v. *Somappa*[6] Venkatasubba Rao, J., set aside a conviction under section 417, Indian Penal Code, because the facts showed that an offence under section 420 had been committed.

My attention has been drawn by Mr. Jayarama Aiyar for the counter-petitioners to a decision of Mukerji, J., in *Emperor* v. *Ram Nath*[7] which appears to be directly in point. A candidate for election to a Municipal Board attested the thumb mark of a person pretending to be a voter in proof of his identity. It was in fact a case of personation, and the candidate was convicted of abetment of cheating and forgery. The offence abetted was however found to fall more specifically under section 171 (*f*), Indian Penal Code, prosecution for which requires the sanction of the Local Government. In setting aside the conviction the learned Judge observed:

> "It appears to me that where the offence in question has been specifically described and designated by the Legislature, it is not open to any Court to say that although the offence may be specifically one under section 171 (*f*) of the Indian Penal Code, it falls equally under section 465 of the same Code and that, therefore, it is open to the Court to try the offender under either of the two sections. Where there are two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one."

If I may say so with respect, this reasoning commends itself to me, and, applying it here, I conclude that the specific offence of fabricating false evidence should be given a preference over the more general offence of forgery. I consider, therefore, that the learned Sub-divisional Magistrate was justified in discharging the accused upon this ground.

The merits of the order have been discussed alternatively with reference to the provisions of clause (*e*) of S. 195 (1), Criminal Procedure Code. Upon this point I have heard a very careful argument on both sides, supported by an abundance of case-law. The question is whether when an offence of forgery is committed by more than one person, one at least being a party to the proceeding in which the document is produced, such participants in the forgery as are not parties to the proceeding may be prosecuted otherwise than under the provisions of sections 195 and 476, Criminal Procedure Code. The answer to the question depends primarily upon the construction to be placed

6 (1924) 20 L.W. 919. 7. (1924) I.L.R. 47 A. 268.

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upon the term "offence" as it is used in clause (*c*)—whether it denotes the transaction of forgery as a whole, so that the Court is debarred from taking cognizance of that transaction, including the shares taken in it by non-parties as well as parties, or whether it refers only to the share taken by a party, so that the power to proceed against non-parties is not affected. Grounds for adopting the former construction are to be found in a Bombay case *In re Narayan Dhonddev Risbud*[8] and whatever countenance they may receive from the language of the clause, I must confess that the circumstances of the present case have impressed me very forcibly with the merits of that view of the law. It seems contrary to public policy that some only of the participants in an alleged act of fabrication—and those perhaps who play a subordinate part—are exposed to prosecution, while the party in whose interests the act is said to have been done is protected. But making every allowance for cases which may be distinguishable, and cases in which the contrary effect of the provision appears to have been taken for granted, there is no doubt that, as observed in *Debi Lal* v. *Dhajadari Gashai*[9] there is a strong body of authority in favour of the opposite view. Having regard to my conclusion upon the first head of the argument, therefore, I refrain from expressing an opinion upon this part of the case. The Criminal Revision Petition is dismissed.

The respondents in the Criminal Appeal, which is preferred against the order of the Sessions Judge of Trichinopoly, dated 20th December, 1927 are the two respondents to the Criminal Revision Petition—M. Vengu Aiyar, N. Ramaswami Aiyar and T. R. Narayanaswami Aiyar. The learned Sessions Judge dismissed the application on the grounds (*a*) that no such application had been preferred to the Sub-divisional Magistrate himself, and that no satisfactory explanation for this omission was given, (*b*) that the principal offenders, namely, the executant of the alleged forged document, and the writer and attestors were not sought to be proceeded against, and (*c*) that the object of the petitioner was not to further the interests of justice. There is much force in these considerations, and in the further consideration that where the Lower Court appears to have reasonably exercised its discretion not to take action, that discretion should not be lightly interfered with. On a survey of all the circum-

8. (1910) 6 I.C. 529: 12 Bom.L.R. 383.
9. (1911) 15 C.W.N. 565.

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stances, including the nature of the evidence which would appear to be available to prove the case, I am clearly of opinion that there are no sufficient grounds to disturb the order. The Criminal Appeal is dismissed.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY.

The Public Prosecutor, Madras .. *Petitioner**

v.

Chockalinga Ambalam and others .. *Respondents (Accused).*

The Public Prosecutor, Madras v Chockalinga Ambalam.

Criminal Procedure Code (V of 1898), S. 526 (8)—Criminal Trial—Intimation of intention to apply for transfer subsequent to close of arguments but before judgment—Court whether bound to adjourn

An intimation to the Court of intention to apply for a transfer, made after the arguments are closed but before the judgment is pronounced, is not one made in the course of the trial within the meaning of S. 526 (8) of the Criminal Procedure Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Session of the Ramnad Division in Criminal Appeals Nos. 28 and 31 of 1928 preferred against the judgment of the Court of the Sub-divisional Magistrate of Devakottah in C.C. No. 116 of 1926.

Vere Mockett and *C. Narasimhachariar* for *K. S. Rajagopala Aiyangar* for respondents (accused).

The Court made the following

ORDER.—The two appeals to which this Revision Petition relates have not been heard upon the merits, as the Sessions Judge has ordered a re-trial of the case in consequence of what he regards as illegalities in the original trial.

On 26th April, 1928, the trying Magistrate refused to adjourn the case when the vakil for the accused intimated his intention of making an application to the High Court for a transfer. The learned Sessions Judge is of opinion that the Magistrate in refusing an adjournment on that occasion acted in violation of section 526 (8), Code of Criminal Procedure.

The learned Public Prosecutor contends that the intimation of intention to apply for a transfer was not made in the course

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*Cr.R.C. No. 806 of 1928.
Cr.R.P. No. 667 of 1928. 30th November, 1928.

The Public Prosecutor, Madras v. Chockalinga Ambalam.

of the trial, which had been closed before it was made, though judgment had not then been pronounced, and therefore the Magistrate in refusing to adjourn the case did not contravene the provisions of section 526 (8). It appears that before the Sessions Judge the Public Prosecutor of Ramnad conceded that after refusing to adjourn the case the Magistrate heard the arguments in the case before he pronounced judgment. If that were so, the trial would not have been over before the intimation of intention to apply for a transfer was made. In an affidavit in support of an application to this Court for bail (Cr.M.P. No. 288 of 1928) the vakil for the accused asserted that some arguments in the case were heard by the Magistrate after he refused the adjournment and before he pronounced judgment. But the Magistrate himself has stated that he heard no arguments in the case after refusing the adjournment. His diary shows that, when the judgment was about to be pronounced, an application under section 526 was made and dismissed and that he then pronounced judgment. His order on the application itself shows that the application was presented when the judgment was about to be pronounced. The Prosecuting Sub-Inspector of Police who conducted the prosecution has made an affidavit that no arguments were heard after the application for adjournment was made. I am informed that the Local Public Prosecutor who made the "concession" before the Sessions Judge had not appeared at any earlier stage of the case and was not instructed to make any such "concession." I must accept the Magistrate's account of what happened before him, which, as I have mentioned, is supported by the record of the case, and find that no argument was heard after the application for adjournment was made but that the case had been closed before that application was made. It has been contended for the accused that nevertheless an application made before judgment was actually pronounced would be made in the course of the trial within the meaning of section 526 on the ground that the trial includes the pronouncing of judgment. But sections 366 and 497 of the Code make it clear that a trial, as that word is used in the Code, is over before the judgment is pronounced and that the pronouncing of judgment is no part of the trial. I find, therefore, that the intimation of intention to apply for a transfer and the application for adjournment for that purpose on 26th April, 1928 were not made in the course of the trial and that the Magistrate's refusal to adjourn the case did not

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violate provisions of section 526 (8) and did not invalidate the trial.

N.S. *Revision petition allowed and appeals remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.

Rajah Keesara Venkatappayya, since deceased, and others .. *Appellants**

v.

Rajah Nayani Venkataranga Row .. *Respondent.*

P. C. — Rajah Keesara Venkatappayya v. Rajah Nayani Venkataranga Row.

Registration Act of 1908, Ss. 41, 40, 32 and 2 (10)—Authority to adopt—Presentation for registration—Person having right—Representative of minor adopted son—Natural father of minor if a—Adoption into same family—Adoption into a different family—Distinction—Decision of Registrar as to competency of person to present document—Effect of—S. 26—Document executed outside British India—Registration duly of, in British India—Validity—Attack on, on the ground that document was not presented for registration within four months of its arrival in British India if open—Concurrent findings of fact—Rule of Privy Council as to—Ejectment suit—Onus on plaintiff in—Infirmity in defendant's title—Civil Procedure Code, S. 13—Adoption—Status of—Decision of Courts in Nizam's Dominions as to—If and when res judicata *in British India Courts.*

Where a child is adopted into the same family, and his natural father is the nearest male agnate, and the proper person to be appointed guardian, and the proper person to act as natural guardian in the absence of any judicial appointment, the natural father is the representative of the adopted son within the meaning of section 32 read with section 3 of the Registration Act of 1877, and is as such entitled to present the authority to adopt for registration under section 40 of the said Act.

The definition of representative in section 3 of the Act does not make it equal to guardian, but says that it includes guardian

Quaere, therefore, where a child of tender years adopted into a different family from that of his natural father is actually residing with his natural father, and has no appointed guardian, the natural father cannot well be said to be the representative of the child within the meaning of section 3.

Section 41 of the Act makes the Registrar the Judge whether the person presenting the authority is entitled to present it.

Quaere, whether, after the due registration in British India of a document which had been executed outside British India, the validity of its registration can be attacked upon the ground that the document was not presented for registration within four months after its arrival in British India as required by section 25 of the Act of 1877.

The ordinary rule of the Board is not to interfere except in very special cases with decisions turning on concurrent findings of fact.

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*P.C. Appeals Nos 12 and 13 of 1925 23rd November, 1928.

P. C.

Rajah Keesara Venkatappayya v. Rajah Nayani Venkataranga Row.

In a suit in ejectment brought by a person claiming to be the nearest heir of the last male owner of the suit property against a person claiming to be the adopted son of the last male owner, *held*, that the plaintiff had to prove his title before any inquiry was made into the defendant's title.

Quaere, whether a person who was at the time resident in and was a subject of the State of the Nizam, can rely upon the fact that his status as the adopted son of a deceased person was accepted by the Courts in the Nizam's dominions as a decision binding on the British Indian Courts on the question of his status precluding all dispute as to the fact and lawfulness of his adoption.

Consolidated Appeals Nos. 12 and 13 of 1925 from two decrees, dated the 1st May, 1919, of the High Court, Madras (Wallis, C.J. and Sadasiva Aiyar, J.) affirming two decrees, dated the 14th April, 1914, of the District Court of Kistna at Masulipatam.

The suits relate to the proprietary right in the Zamindari of Munagala in the Kistna District, and the main question argued in these appeals before the Privy Council was whether the adoption of the respondent by Latchamma, the previous recorded proprietrix of the Zamindari, was valid either generally or within British India.

The facts relating to the adoption of the respondent by Latchamma may be stated shortly as follows:—

Latchamma married a Deshmukh of Hyderabad, one Nayani Venkata Ramayya. He died on the 15th May, 1875. On the 10th May, 1875, at Vavilala, Nizam's dominions, he is said to have executed a written authority to adopt, and on the 15th May, 1875, a few hours before his death, to have given this into his wife's hands at Torrur, also in the Nizam's dominions. Latchamma did not act on this power of adoption till 19th November, 1883, when she adopted the present respondent. Latchamma died on the 26th March, 1892. The authority to adopt was presented for registration to the Sub-Registrar at Bezwada on the 20th August, 1892, by Nayani Raghava Reddi (the respondent's natural father), respondent then being a minor about fourteen years old, and was in fact registered. The appellants disputed the validity of the registration on two grounds:—(1) that the power was not registered within four months from the date of its arrival in British India; and (2) that it was not presented by a person having authority to present.

The case was tried by the District Judge of Kistna, who, on the 14th April, 1914, delivered one judgment and passed two decrees dismissing both suits. He summarized his conclusions as follows:—

"The adoption of the defendant was valid and legally carried out. The power to adopt was duly registered in British India within four months

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of its first being brought into British India There were no irregularities in its registration that would invalidate it."

The plaintiffs preferred two appeals to the High Court of Madras, and the appeals were heard by Sir John Wallis, Chief Justice and Mr. Justice Sadasiva Aiyar, who on the 1st May, 1919 passed two decrees dismissing both appeals. The learned Judges delivered separate judgments. On the question of registration the learned Chief Justice held that the Indian Registration Act did not apply to the authority to adopt the respondent. Sadasiva Aiyar, J., agreed with the District Judge that the authority to adopt was not received within British India more than four months before it was presented for registration and that the presentation for registration was valid. The proceedings in the High Court are fully reported in *Venkatappayya* v. *Venkataranga Row.*[1]

From the said decrees of the High Court the plaintiffs preferred these two consolidated appeals to His Majesty in Council, and contended (*inter alia*) that "The learned Judges ought to have held that the presentation of the document by the natural father of the defendant is improper and renders the registration null and void," and that "The natural father is not one of the persons who can present the document. He is neither a natural guardian, nor one appointed by law. Any rules to the contrary framed under the Registration Act are *ultra vires* and are not binding on Courts of law."

A. M. Dunne, K.C. and *J. M. Parikh* for appellants.

W. H. Upjohn, K.C., Leslie De Gruyther, K.C., K. V. L. Narasimham and *Subba Row* for respondent.

Dunne, K.C.—The authority to adopt cannot affect property in British India unless registered in compliance with the provisions of the Indian Registration Act.

[*Sir Lancelot Sanderson.*—The Chief Justice says that the Indian Registration Act does not apply at all in this case.]

What the learned Chief Justice said was that the Registration Act could not apply to a foreigner.

[*Lord Phillimore.*—Section 40 of the Act does not touch adoption. The section refers only to authorities to adopt. According to the Law of Hyderabad State, a widow can adopt, and if she adopts, is it necessary for the authority to be registered? What you have to prove is that by the law of Hyderabad the boy is recognized as the adopted son.]

But that would not enable a person to come from Hyderabad and bring a suit in British India on a parol authority to

1. (1919) I.L.R. 43 M. 288: 38 M.L.J. 149.

adopt. The British Indian Legislature tells the Courts not to recognize authorities to adopt unless registered.

[*Lord Phillimore.*—If the boy was adopted according to the law of Hyderabad, it is sufficient in British India. When the law of India permits such adoptions, and the adoption has taken place according to the law of the domicile, cannot the boy show that according to the law in force in Hyderabad he was adopted?]

The only question is, can this document be put in evidence in face of the provisions of the Registration Act.

[*Lord Phillimore.*—He cannot put it in evidence, but cannot he say that he was adopted by the lady in Hyderabad?]

Upjohn, K.C., referred to the proceedings in the Hyderabad Courts, where it was held that the adoption was valid.

The Chief Justice says that the Registration Act is not intended to apply to documents executed by persons not domiciled in British India. On the construction of the Act itself, he agrees with Sadasiva Aiyar, J., that section 32 has to be read with section 40.

[*Lord Phillimore.*—I suppose there is no evidence whether this document was received within four months in British India.]

[*Lord Atkin.*—You would not quarrel with the statement in the judgment of Sadasiva Aiyar, J., that "even if the Sub-Registrar erroneously thought that it was presented within four months after its arrival in British India, once he effected the registration his irregularity in having registered it was cured by section 87 of the Registration Act.]*

[*Lord Phillimore.*—In dealing with succession to property, we must recognize the law of domicile.]

There is no question that in Hyderabad the boy is treated as the adopted son.

[*Lord Phillimore.*—There was an enquiry in the Hyderabad Courts and they held that he was the adopted son.]

[*Sir Lancelot Sanderson.*—S. 32 has to be read with S. 40, and you have to show that the natural father was the agent.]

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*In the passage above cited (which is reported in *Venkatappayya* v. *Venkataranga Row*, (1919) 38 M.L.J. 185: 59 I.C. 997, but omitted in *Venkatappayya* v. *Venkataranga Row*, (1919) I.L.R. 43 Mad) Sadasiva Aiyar, J., was merely putting forward the argument of defendant's counsel, and his Lordship's own opinion was that the registration of a document presented beyond the prescribed period of four months was not a mere irregularity which could be cured by section 87 of the Registration Act; (see *Venkatappayya* v. *Venkataranga Row*, (1919) I.L.R. 43 M 308).—K.J.R

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See definition of "representative" in S. 2, sub-section (10), which includes the guardian of a minor. I rely on the judgment of Lord Atkinson in *Amba* v. *Shrinivasa Kamathi*[2] and also on Lord Salvesen's judgment in *Vijayaratnam* v. *Sudarsana Rao.*[3]

[*Lord Phillimore.*—Who presented the document for registration in the case last cited?]

The legatee under the will.

[*Lord Phillimore.*—A legatee under the will could present it as a will, but not as an authority to adopt, as he would be a stranger. It was in that case an authority to adopt registered at the instance of a legatee, but not a will, and under the circumstances it was held that it was not properly presented.]

[*Lord Phillimore.*—There, at the time of registration, the widow had not adopted, and there was no one else to present the document. In the case now under appeal, the adopted boy could present. In *Vijayaratnam* v. *Sudarsana Rao*[3] there were only two people who could present (namely, the donee and the adoptive son), but there was at the time no adopted child.]

[*Lord Atkin.*—The document there was presented for registration by a legatee. The Privy Council held that, inasmuch as the will was inoperative, it could not operate as a will, and therefore as it gave authority to adopt, it had to be registered as if it was an authority to adopt conferred by some other document (not being a will). The document there was no more a will than a bill of exchange. It was a paper writing which could be valid as an authority to adopt, and as an authority to adopt it was presented by a person who had no power to present it as such, though he had very good authority to present it as a will.]

I rely on *Narayana Reddi* v. *Audilakshmi Ammal*[4] a judgment of Kumaraswami Sastri and Reilly, JJ. It relates to an authority to adopt given to a minor, a married girl, by her husband, and presented by the minor's natural father.

[*Lord Atkin.*—In *Amba* v. *Shrinivasa Kamathi*[2] was the husband still alive when the document was presented?]

Yes. The document in the Madras Law Weekly case was presented by the minor's father. She was married. The learned Judges held that the document was not presented by a person

2 (1921) 26 C.W.N. 369.

3 (1925) L.R. 52 I.A. 305: 48 M. 614: 49 M.L.J. 247 (P.C).

4. (1928) I.L.R. 51 M. 462; 55 M.L.J. 102; 27 L.W. 469.

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entitled to present it. They quote *Amba* v. *Shrinivasa Kamathi*[2] and say that the question is concluded by that Privy Council decision. They dissent from *Venkatappayya* v. *Venkataranga Row*,[1] which is the case now before your Lordships.

[*Lord Atkin.*—The *ratio decidendi* of *Amba* v. *Shrinivasa Kamathi*[2] was that the father of a married minor girl was not her natural guardian.]

The husband there was alive, though living apart from his minor wife.

[*Lord Phillimore.*—After marriage, the husband was the guardian, and so the father was not the guardian to present the document for registration. The Privy Council there said that the father was not the legal or the natural guardian of the minor.]

Section 40 does not contemplate presentation by a representative.

[*Lord Atkin.*—It is an elementary rule that a person can act through an agent.]

[*Lord Phillimore.*—It would be curious to hold that a guardian could not present a document. The decision you cite from *Narayana Reddi* v. *Audilakshmi Ammal*[4] says that there could be no guardian at all under S. 40 to present the documents. That cannot be right. You must construe section 32 with section 40.]

J. M. Parikh on the same side: Part VI of the Registration Act excludes Part VIII.

[*Lord Phillimore.*—There is nothing in Part VI which excepts Part VIII.]

Part VI does not contemplate Wills, the registration of which is optional; *see* section 18.

[*Lord Phillimore.*—I suppose it means a will in the lifetime of the testator.]

[*Lord Atkin.*—Section 32 refers to every document, whether optionally or compulsorily registrable.]

[*Lord Phillimore.*—You cannot register a will or an authority to adopt without the consent of the testator or the donor of the authority.]

I submit that section 32 cannot be read with the latter part of section 40.

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1. (1919) I.L.R. 43 M. 288: 38 M.L.J. 149.
2 (1921) 26 C.W.N. 369.
4 (1928) I.L R. 51 M 462: 55 M.L.J 102: 27 L.W. 469.

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W. H. Upjohn, K. C. for respondent.

[*Lord Phillimore.*—Is there any Act which allows a guardian to present an authority to adopt on the minor's behalf?]

There is no express provision, except section 27 of the Guardian and Wards Act which relates to the duties of guardians in respect of the ward's property.

[*Lord Atkin.*—The Guardian and Wards Act does not deal with the powers and obligations of a natural guardian.]

The definition of guardian in section 4 of the Act certainly includes a natural guardian.

Their Lordships asked Mr. Upjohn to address them on the question of registration, namely, whether a guardian can act at all, and whether the minor's natural father in the present case was his guardian in fact?

[*Lord Atkin.*—You have got to show that the defendant was properly adopted.]

[*Lord Phillimore.*—You cannot succeed unless you show that the adoption was made under the authority of the lady's husband.]

Succession to immoveable property in British India depends upon personal law. The general rule is that a man's title to succeed to immoveable property depends on his personal law.

The presentation for registration in this case was by the minor's guardian. By reason of his adoption my client ceased to belong to his natural family, but the natural father would still be the nearest agnate.

Dunne, K.C.—I accept that proposition.

[*Lord Atkin.*—When enquiry was made by the Sub-Registrar, was any objection preferred to the presentation by the natural father?]

No.

[*Lord Atkin.*—If they had then objected, the adopted son could have been produced to present the document, and the defect could have been cured at once.]

De Gruyther, K.C., points out, referring to *Jambu Prasad v. Muhammad Aftab Ali Khan*,[5] that a different view has been taken by the Board.

[*Sir Lancelot Sanderson.*—Here, the question is, whether the father was the natural guardian?]

[*Lord Phillimore.*—The question here is, whether the father, not merely *qua* his natural father, but as the nearest

5. (1914) L.R. 42 I A. 22: I.L.R 37 A 49: 28 M.L.J. 577 (P.C).

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male relation of the adopted boy, was entitled to present the document.]

[*Lord Atkin*, after perusing *Jambu Prasad* v. *Muhammad Aftab Ali Khan*,[5] distinguishes that case.]

[*Sir Lancelot Sanderson.*—In that case, apparently, the person contesting the registration was the mortgagor.]

[*Lord Phillimore.*—The father here was the *de facto* guardian and the person qualified to become, by appointment, the *de jure* guardian.]

See the definition of "representative" in section 2, sub-section (10) of the Registration Act; the sub-section does not say, a guardian appointed by the Court. It simply says, any guardian. The father in this case was the natural guardian and representative of the boy.

The father was (1) the natural guardian, (2) the nearest male relation in care of the boy, and (3) he was in fact acting as the natural guardian. All these facts show that he was the guardian. See *Nirvanaya* v. *Nirvanaya*[6] and *Watson & Co.* v. *Sham Lal Mitter.*[7] The decision in *Nirvanaya* v. *Nirvanaya*[6] fully bears out my contention.

[*Lord Phillimore.*—In that case, it looks as if the boy was only adopted for certain religious purposes, *i.e.*, as a disciple, and not for all purposes. As regards *Watson & Co.* v. *Sham Lal Mitter*[7] it was held that the mother was acting in the interests of the son and therefore the compromise was binding. Somebody there suggested that she was acting in opposition to the son, but it was held the other way.]

[*Sir Lancelot Sanderson.*—In your case, the natural father was still the guardian and as such could present the document for registration.]

[*Lord Phillimore.*—The father, even after the adoption, was the nearest male relative and as such was the guardian, and could present for registration.]

We have here these accumulated facts: (1) the natural relationship; (2) the agnatic relationship; (3) the living with the father. All these show that he was the representative. If he was not the representative, who else could be?

5. (1914) L.R 42 I A 22: I.L.R. 37 A. 49: 28 M.L.J. 577 (P.C.).
6. (1885) I.L.R 9 B. 365.
7. (1887) L.R. 14 I.A. 178: I.L.R. 15 C. 8 (P.C.).

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[*Lord Phillimore.*—Rejecting for the moment that he was, so to speak, the physical father, he was undoubtedly the agnatic relative and natural guardian, and so could present the document.]

He was the natural father who was fighting for the son to complete the adoption.

To sum up in one word, he was the representative; *see* section 32 of the Registration Act.

[*Lord Atkin.*—It is not disputed that once you establish the guardianship, he is the representative.]

[*Sir Lancelot Sanderson.*—When was the point first raised that the document was not presented by the proper person?]

It was not taken, I think, until the trial of the action. It is not brought out in any plea.

[*Lord Atkin* refers to issue No. 7, "Whether the alleged written authority, dated 10th May, 1875, is invalid and inoperative in British India."]

The decision in *Amba* v. *Shrinivasa Kamathi,*[2] upon which my learned friend, Mr. Dunne laid so much stress, is clearly distinguishable. *See* Mayne's Hindu Law, para. 211. When a minor girl is married, the husband is the guardian, although they are not living together. This disposes of that ruling. There, the husband was the guardian. The appellant in that case was a married woman and her father had ceased to be her natural guardian and had not been appointed the legal guardian, and he was not therefore her representative. I submit that the decision in *Amba* v. *Shrinivasa Kamathi*[2] really supports my contention. It implies that had the father been the natural guardian, he would have been the proper person to present the document.

The decision in *Vijayaratnam* v. *Sudarsana Rao*[3] is also distinguishable.

[*Lord Phillimore.*—That case is clearly distinguishable.]

I also submit that the case cited from *Narayana Reddi* v. *Audilakshmi Ammal*[4] can be distinguished.

A. M. Dunne, K.C., replies. The whole point turns on the construction of section 40 of the Registration Act, and in constructing it, my learned friend, Mr. Upjohn, puts it that you have to construe it as merely supplementary to the general provisions of section 32, and as merely ancillary thereto, and not as a separate provision.

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2. (1921) 26 C.W.N. 369.
3. (1925) L R. 52 I.A 305: I.L.R 48 M. 614: 49 M.L.J. 247 (P.C.).
4. (1928) I.L.R. 51 M. 462: 55 M.L.J. 102: 27 L.W. 469.

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See section 41, which says that the Registrar has to be satisfied that the person presenting the authority is the proper person under section 40. Section 40 enacts that only certain persons, in certain events, can present. My learned friend's argument would leave out the important words "under section 40" from the last para. in section 41. I submit that section 40 is complete by itself and cannot be read along with section 32.

23rd Nov. 1928. Their Lordships' judgment was delivered by

Lord. Phillimore.

LORD PHILLIMORE.—These are two consolidated appeals in two suits both brought so long ago as the year 1895, being claims to the Zamindari of Munagala in the Kistna District. They arose in the following circumstances:—

Kodanda Ramayya, who was Zamindar, died in the year 1854. He left no son; but his mother, his widow, and a daughter by her named Latchamma survived him. She married a subject of the Nizam of Hyderabad, who died in 1875. Her husband was said to have given his wife an authority to adopt a son, and it was asserted on behalf of the present respondent, Nayani Venkata, that he had been so adopted. The Court of Wards took possession of the estate on behalf of the women, and it was enjoyed by them, not without question, until the death of Latchamma, in March, 1892.

Thereupon disputes arose, and various members of the Keesara family, who were agnates of the last male Zamindar, claimed that the estate was an ordinary Hindu estate owned by a joint Hindu family, further saying that the present respondent had no title as an adopted son, there neither having been any authority to adopt nor any adoption in fact. The defence set up a custom of impartibility and descent by lineal primogeniture and the title by adoption, and further pleaded the Limitation Act.

The District Judge, in a very careful judgment, found that the estate was an impartible one, and that the plaintiffs' claim was ill-founded, resting largely upon forged documents; and he dismissed this suit, which though first in time is second under the order consolidating these appeals. The District Judge further held that the defence of the Limitation Act, if it was required, would have been a sufficient answer to the suit.

On appeal, the High Court affirmed this judgment. Both Judges held in express terms that the case of the plaintiffs had not been established. The Chief Justice further held that the

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defence of the Limitation Act was good. The other Judge did not find it necessary to express an opinion on the point.

When the matter came before their Lordships, counsel for the appellants in the first suit found himself unable to resist the conclusion that the decisions in India had turned upon matters of fact upon which there were concurrent findings in both Courts, and he was unable to take this case out of the ordinary rule of this Board, refusing to interfere except in very special cases with decisions turning on concurrent findings of fact. It was clear, therefore, that this appeal must fail.

In the second suit, first in the consolidation order, one of the Keesara agnates purported to accept the position that the estate was by custom an impartible estate. He did not, however, accept the further proposition that it descended by lineal primogeniture. He claimed that he was the nearest reversionary heir excluding the respondent, whose adoption he contested. The defence denied the plaintiff's title, set up the adoption, and pleaded the Limitation Act. When the case came before the District Judge, he decided in favour of the respondent on all grounds. He held that the estate descended by lineal primogeniture, and that if this was the case, the plaintiff was not the next heir, even if there were no adoption. He further held in favour of the adoption and the defence of the Limitation Act.

When the case came before the High Court, the decision was affirmed, and the appeal was dismissed. The learned Judges of the High Court do not appear to have considered the question whether the plaintiff was, if the adopted son were excluded, the nearest reversionary heir. But the conclusions at which they had arrived in the former suit were sufficient for dismissing this suit also; and accordingly both appeals were dismissed on the 1st May, 1919.

Here, their Lordships must pause to comment upon the lamentable delay which has taken place. These suits, as already observed, were both started in the year 1895 in respect of claims which, if well-founded, would have accrued in 1892. It is true that some of the delay is to be accounted for by the fact that when the cases first came before the District Judge, he attempted to deal with them by a short cut, deciding in favour of the respondent on 21st May, 1904, and that time was consumed in the appeal from these orders and the consequent remand. But he gave his second judgment on 14th April, 1914, and it has taken till now to bring the matter before their Lordships. Some

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delays are to be accounted for by the fact that in the agnates' suit there were very many plaintiffs, and that all of them except the one plaintiff were made defendants in the other suit; and that from time to time deaths occurred, and that new parties had to be added by way of revivor or of supplement.

But, even so, the delays are discreditable.

Now with regard to the second appeal. It was rightly contended by Counsel for the respondent that before any enquiry was made into his client's title, the plaintiff had to prove his own title, and that upon the holding of the District Judge, which he was prepared to support, the plaintiff had in any event no title. So far as this line of defence was indicated, it seemed to their Lordships not unlikely that it would succeed. But as it also seemed to their Lordships that the grounds on which the High Court decided might be sufficient, and that the conclusions arrived at in the first suit as to the impartibility of the estate and its descent by lineal primogeniture, must also be accepted in this second suit, they proceeded to hear the argument upon the question of adoption.

Now this was attacked in three ways. First of all it was said that Latchamma had never adopted; secondly, that her husband had never given her authority to adopt; and thirdly, that the alleged written authority to adopt, on which reliance was placed, could not be looked at as it had not been registered in British India as required by the Registration Act.

Several of these points turn on questions of fact. Both Courts found that Latchamma had adopted the respondent. Both found that there was no oral authority from her husband, but both found that the written authority, if it could be looked at, was genuine. Then came the questions under the Registration Act, and here again one of these questions also turned upon fact, and so turning, was again found in favour of the respondent, and upon none of these questions of fact has any reason been shown to their Lordships for not accepting the concurrent findings.

The Indian Registration Act, 1877, provides by section 17 that an authority to adopt not conferred by a will shall be registered, and by section 25* that any document requiring registration which has been executed outside British India, shall be presented for registration within four months after its arrival in British India, and by section 49 that no document required

*Corresponding to section 26 of the present Registration Act.

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by section 17 to be registered shall be received in evidence unless registered in accordance with the Act.

It was contended for this appellant that Latchamma, who had left Hyderabad after her husband's death, and come to reside at her old home, had brought the document with her into British India, more than four months before she presented it for registration. This issue of fact, if it was open after the decision of the Registrar, was found in favour of the respondent.

The one question that then remained was whether the document which was in fact registered had been duly presented as required by the Act.

The sections which relate to this matter are the following:

32 "Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

"by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order,

"or by the representative or assign of such person,

"or by the agent of such person, representative or assign, duly authorized by power-of-attorney executed and authenticated in manner hereinafter mentioned."

40 "The testator, or after his death any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration,

"and the donor, or after his death the donee, of any authority to adopt, or the adoptive son, may present it to any Registrar or Sub-Registrar for registration"

41. "A will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document.

"A will or authority to adopt presented for registration by any other person entitled to present it, shall be registered if the registering officer is satisfied,

(a) that the will or authority was executed by the testator or donor, as the case may be;

(b) that the testator or donor is dead; and

(c) that the person presenting the will or authority is, under section 40, entitled to present the same"

Now the authority to adopt was presented to the Registrar on 20th August, 1892, by Nayani Raghava Reddy, who describes himself as natural father and guardian of the minor. The Registrar examined witnesses and came to the following conclusions:—

"From the depositions of the above-said witnesses I have satisfied myself with respect to the matters mentioned herein below:—

(1) That this document was executed and given by the person who purports to have executed and given it.

(2) That the executant is dead.

(3) That the person who presented this document has authority according to section 40 of the Registration Act to present the same."

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And thereupon he registered the document.

The contention is that the person presenting was, though the Registrar had accepted him, nevertheless not the person who could lawfully present under the terms of the Act. The argument took this shape. First that section 40 excludes the provisions of section 32 and limits the persons entitled to present for registration an authority to adopt, to the actual donor if living, and to the donee and the adopted son after the donor's death, and that it will not do to have it presented by the representative of the adopted son.

Their Lordships do not take this view. They agree with the learned Judges in the Court below and on this particular point they would specially refer to the judgment of the second Judge in the High Court, Sadasiva Aiyar, J.

Section 40 is intended for the case of what may be called ambulatory documents, documents which can be revoked at any moment, and which will have no binding effect till the death of the executant, and to that extent they are taken out of S. 32. An intended executor, legatee or donee of a power might possibly under section 32 be considered as a person claiming under the instrument. But he is not to be allowed to present a document for registration while it is still capable of revocation. On the other hand, the class of persons who after death may claim to register, is defined and it may be said expanded. It is not merely the executor but also the legatee. It is not merely the donee of the power to adopt, but also the person claiming to have been adopted. These are the principals. Then given the principals, section 32 introduces certain agents who can take the place of principals, and one of these agents is the representative of a person claiming under the document. Now the word representative is defined in section 3* as including the guardian of a minor. Here the person presenting describes himself as being the natural father and guardian. It is said that when adoption has once taken place, the adopted child is removed wholly out of his natural family, and that his natural father has no longer a legal relation to him. This may be taken to be the case; but what is to happen when a child of tender years, as was the case here, is actually residing with his natural father, and has no appointed guardian. When one remembers that the definition of representative does not make it equal to guardian, but says that it includes guardian, might it not well be said that

*See now section 2, sub-section (10) of the Indian Registration Act, 1908.

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in these circumstances and in the absence of any legally appointed guardian the natural father was the representative?

However, it is not necessary to decide this. It appears that, as so often happens, the adoption was of a child of the same family, and that if the child be taken as having entered into his adoptive father's family, the natural father was nevertheless the nearest male agnate, and the proper person to be appointed guardian, and the proper person to act as natural guardian in the absence of any judicial appointment. If there were any doubt upon these facts, it might further be observed that, by section 41, the Registrar is made the Judge whether the person presenting the authority is entitled to present it, and though objection was raised on behalf of this appellant to the registration on the ground that it was out of time, no similar objection was raised as to the propriety of the person presenting.

If this conclusion be arrived at, it is as unnecessary to enter upon the defence of the Limitation Act as it is upon the question of the plaintiff's title. Neither is it necessary to discuss the important but somewhat abstruse question, whether the respondent being at that time resident in and a subject of the State of the Nizam, can rely upon the unquestioned fact that his status as an adopted child was accepted by the Courts in the Nizam's dominions, as a binding decision on the question of his status precluding all dispute as to the fact and lawfulness of his adoption.

Upon the whole their Lordships will humbly advise His Majesty that both appeals fail, and should be dismissed with costs.

In 1913 a petition by the respondent was before the Board applying for special leave to appeal from the orders remanding the suits. The Board did not feel able to advise that special leave to appeal should be granted from interlocutory orders, so their Lordships directed the petition to stand over generally until the proceedings on the merits in the Courts below had terminated, and they intimated that the costs of that application ought to be costs in the suits. As no order has been made in the Courts below as to these costs, it remains for their Lordships to advise that these costs should be included by the respondent in his costs of these appeals, which the appellants will pay. As the petitioner has been successful in these appeals his petition has no further object and should be dismissed.

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"the certificate referred to in Order 21, Rule 2, Civil Procedure Code, 1908, shall be in the form appended below. It may be presented without any formal application and need not be stamped, but if accompanied by a formal application, such application must be stamped under the Court Fees Act in which case the value of the stamps shall not be charged as costs against the judgment-debtor."

It has been held over and over again in India that Art. 181 of the Limitation Act does not apply to purely ministerial matters upon which the Court makes no order. So far as Oudh is concerned, under Rule 168, no application at all is necessary by the decree-holder to certify a payment.

[*Lord Phillimore.*—Your client (the decree-holder) in fact put in what purported to be a formal application to certify.]

It was merely an intimation to the Court. All the decree-holder has to do under the rules is to notify the payment to the Court, which is a purely ministerial act.

23rd Nov. 1928. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—By an order of His Majesty in Council, dated the 22nd April, 1927, special leave was granted to the appellant Raja Shri Prakash Singh to appeal against the decree of the Chief Court of Oudh, dated the 4th of October, 1926.

The facts relevant to the appeal are as follows:—

By two mortgage deeds, one dated the 24th March, 1911, to secure the sum of Rs. 3,50,000 and interest and the other, dated the 20th March, 1913, to secure the sum of Rs. 12,00,000 and interest, certain property now belonging to the appellant was mortgaged to the respondents. In the year 1916, the respondents brought a suit in the Court of the Subordinate Judge of Sitapur to recover the amount due on these two mortgages and future interest against Raja Debi Prakash Singh (the father of the appellant since deceased) and the appellant; and on the 4th December, 1916, a decree was passed in the terms of a compromise made between the parties.

By the said compromise it was agreed that a sum of Rs. 16,67,049-12-6 was due under the said mortgages including interest and costs and it was provided that out of the aforesaid sum the sum of Rs. 3,754 for costs was to be paid within a week (and this was done) and that the sum of Rs. 16,63,295-12-6 which after payment of costs would remain due was to be paid by instalments of Rs. 60,000 (to be paid on each 30th April of the years 1917 to 1922 inclusive) and of Rs. 80,000

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(to be paid on each 31st October of the years 1917 to 1921 inclusive) and that the whole of the balance with interest as therein provided was to be paid on the 31st October, 1922 and that the respondents should be entitled to take out execution for the whole amount as might then be due under the decree by annulment of instalments and to recover the same by sale of the mortgaged property in three cases, one of which was stated as follows:—

> "If the instalments are only partly paid and the total shortage in the payment of any instalment or instalments owing to such part payment amount to Rs. 60,000 or in other words, so long as the total unpaid amount of instalment or instalments is below Rs. 60,000 the Bank" (that is the Respondents) "will not acquire right to execute the decree but it will acquire right to execute as soon as the arrears amount to Rs 60,000."

It was also provided that in the event of the respondents having to execute their decree under the contingencies therein above mentioned, it should be open to the respondents to execute the decree without applying for and obtaining a decree absolute or final decree for the sale of the mortgaged properties.

On the 14th March, 1917, the respondents certified to the Court of the learned Subordinate Judge, payments by the judgment-debtors, *i.e.*, by the appellant and his father amounting to Rs. 40,000 and such payments were duly recorded.

Further payments were made from time to time by the judgment-debtors to the respondents out of Court, the date of the last payment being 26th October, 1923. It was agreed by the learned counsel for the appellant that the total amount of unpaid instalments was below Rs. 60,000 until April, 1922; in other words that the arrears of instalments for the first time amounted to Rs. 60,000 in April, 1922.

With the exception of the Rs. 40,000 already mentioned, the respondents did not certify to the Court any of the aforesaid payments until the 8th of December, 1924.

On that date a document was filed on behalf of the respondents in the Court of the learned Subordinate Judge.

It was headed "Application under Order 21, Rule 2, Civil Procedure Code" and was as follows:—

> The humble petition of Allahabad Bank Limited, Lucknow Branch, plaintiff decree-holder most respectfully showeth:—
>
> (1) That on the 4th December, 1916 a decree for Rs. 16,63,295-12-6 was passed against defendant No. 1 now dead and represented by defendant No. 2 and defendant No 2 Kunwar Sri Prakash Singh to be paid according to the instalments mentioned in para 3 of the compromise filed on behalf of the defendants and accepted by the plaintiff's pleader and agent on 10th November, 1916 with interest at Rs. 7-8 per cent per annum.

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(2) That under the compromise and the decree, it was provided that the decree shall stand as a decree for sale of the mortgaged property specified in the Schedules A and B attached to the decree and the compromise.

(3) That the Bank decree-holder has received Rs. 8,30,316-8-0 in part satisfaction of the aforesaid decree on different dates as per statement of decree account attached to this application.

(4) That the Bank decree-holder certifies the said payments made to it and prays that the Court may be pleased to record the same accordingly under Order 21, Rule 2 (1) of the Civil Procedure Code.

The statement of decree account which was attached to the said document set out the various payments, the last payment, as already stated, being under date October 26, 1923.

The learned Subordinate Judge on the 8th of December, 1924, recorded the said payments; no notice of this proceeding was given to the appellant, who at that time was the sole judgment-debtor, his father having died.

On the 14th February, 1925, the respondents applied to the Court of the learned Subordinate Judge for execution of the decree, praying that Rs. 17,39,110-1-1 with interest as mentioned in the application should be realised by sale of the mortgaged property.

The appellant filed written objections on the 23rd May, 1925, and raised further objections at the hearing.

The learned Subordinate Judge framed the following issues:—

(1) Is the execution application within time?

(2) Whether the certification and the recording of payments are invalid and barred by time?

(3) Whether amount claimed is correct?

On the 15th May, 1926, the learned Subordinate Judge dismissed the appellant's objections, his findings on the issues being against the appellant except in respect of certain sums wrongly claimed in respect of interest, which he directed should be rectified.

The appellant appealed to the Chief Court of Oudh at Lucknow against the order of the learned Subordinate Judge, and on the 4th October, 1926, the learned Judges of the Chief Court dismissed the appeal. The learned Judges, in their judgment, stated that the position taken up by the appellant was to the effect that—

"Although the Bank applied for execution within three years of the first date when execution was permitted under the terms of the decree, in view of the circumstance that the judgment-debtor had made sufficient payments in satisfaction of the instalments, the application for the execution is nevertheless time-barred, and the decree-holder is left without

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remedy in respect of the balance due. His learned Counsel has argued in support of this proposition upon three main points. He has argued that in the first place the Court cannot recognise any payments or adjustments after the 14th March, 1917, on the plea that no certification can be accepted by a Court unless it has been made within three years of the date of satisfaction. His second point is that on the date of the second certification, the 8th December, 1924, the decree had automatically become time-barred, inasmuch as there had been no certification between the 14th March, 1917, and the 8th December, 1924. His third point is that the decision of the trial Court to the effect that there had been acknowledgments in writing by the judgment-debtor which saved limitation, is incorrect

The learned Judges held that a certification of payments by the decree-holder under the provision of Order 21, Rule 2 (1) of the first schedule to the Code of Civil Procedure of 1908 was not an application within the meaning of Art. 181 of the Indian Limitation Act of 1908, on which the appellant had based his argument, and consequently, that the application for execution was not time-barred.

The learned Judges, relying on these findings, dismissed the appeal and did not decide the third point which related to the alleged acknowledgments in writing by the judgment-debtor.

The argument presented to the Board on behalf of the appellant was to the effect that a document filed by the decree-holder certifying a payment made out of Court under the provisions of Order 21, Rule 2 (1) aforesaid, is an application within the meaning of Art. 181 of the Indian Limitation Act, and that it must be presented to the Court within three years of the date when the payment, which it is desired to certify, was made.

It was further argued that an application by the decree-holder under the aforesaid rule cannot be made at a time when, but for the payments sought to be recorded, the statute would have run and the right to execute the decree would be time-barred.

On this basis it was argued that in this case the Court ought not to have recognised any payments made after the 14th March, 1917, on which date the payment of Rs. 40,000 was certified and recorded, and that on the 8th December, 1924, the decree, dated the 4th December, 1916, had become time-barred as there was no certification of payments by the decree-holder between the 14th March, 1917, and the 8th December, 1924.

On the other hand, it was argued on behalf of the respondents that it was not necessary for the decree-holder to make a

formal application when certifying a payment out of Court under Order 21, Rule 2 (1), that the certification of payments made by the respondents under the said rule was not an application within Art. 181 of the Indian Limitation Act, and that there is no statutory period within which the decree-holder must certify to the Court a payment made to him by the judgment-debtor out of Court.

Reliance was placed upon Rule 168 of the Oudh Civil Digest and the form referred to in the said rule, and it was contended that the terms of the said rule showed that the contention of the respondents was correct.

It was further argued on behalf of the respondents that they had no right to apply for execution until April, 1922, by reason of the payments made by the judgment-debtor, that such payments had been certified by them to the Court, that the Court had recorded the payments, and therefore that the application for execution of the decree was made within time.

Many decisions of the Courts in India were cited to their Lordships, and it is apparent from a consideration thereof that at one time there was a difference of opinion among the learned Judges who dealt with the matter. Their Lordships do not think it necessary to refer in detail to the cited cases; it is sufficient to say that in their opinion the weight of authority, especially in the later decisions, seems to be in favour of the contention of the respondents—as, for instance, *Pandurang* v. *Jagya*,[2] *Jalim Chand Patwari* v. *Yusuf Ali Chowdhuri*[3] and *Joti Prasad* v. *Srichand*.[4]

It is necessary, therefore, to consider whether the document filed by the respondents in the Court of the learned Subordinate Judge on the 8th December, 1924, was an application within the meaning of Art. 181.

Order 21, Rule 1 (1) is as follows:—

"(1) All money payable under a decree shall be paid as follows, namely.—

(a) into the Court whose duty it is to execute the decree; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which made the decree directs."

Order 21, Rule 2, has three sub-rules, and they provide as follows:—

"(1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to

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2. (1920) I.L.R. 45 B 91. 3. (1924) I.L.R. 54 C. 143.
4. (1928) 26 A.L.J. 966.

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the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

"(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree."

The terms of Rule 2 (1) do not provide for any application being made by the decree-holder.

The provision is that where money payable under a decree is paid out of Court to the satisfaction of the decree-holder, the decree-holder shall certify the payment to the Court, and the Court shall record the same accordingly.

The rule contemplates a simple procedure, *viz.*, a certification of payment by the decree-holder to the Court and a record by the Court of the payment; it does not provide for any notice being given to the judgment-debtor.

Order 21, Rule 2 (2) provides an opportunity for the judgment-debtor to inform the Court of a payment made by him out of Court, and the procedure specified by this sub-rule is very different from the procedure referred to in sub-rule (1).

The judgment-debtor may inform the Court of the payment and apply to the Court to issue a notice to the decree-holder to show cause why such payment should not be recorded.

Sub-rule (2), therefore, does contemplate an application by the judgment-debtor; further, it provides for notice being given to the decree-holder, it affords an opportunity for the decree-holder to appear, and it involves a judicial decision by the Court whether the payment should be recorded.

It is to be noted that in the case where an application under Order 21, Rule 2 (2) is made by the judgment-debtor for the issue of a notice to the decree-holder to show cause why a payment made out of Court of any money payable under a decree should not be recorded as certified, it is provided by Art. 174 of the Schedule of the Indian Limitation Act that such application shall be made within 90 days of the time when the payment was made.

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There is no express article of the Limitation Act applicable to the certification by the decree-holder of a payment made out of Court to him.

It is difficult to understand why the Legislature should have prescribed a specified time for the application under Order 21, Rule 2 (2) and should have made no specific provision of limitation with regard to the procedure of certifying by the decree-holder under Order 21, Rule 2 (1) if such procedure were regarded as an "application" within the meaning of the Limitation Act.

It is also difficult to understand why the Legislature, according to the contention of the appellant, should have prescribed a period of three years from the date of payment within which the decree-holder might certify the payment, and at the same time provide that the judgment-debtor must make his application under Order 21, Rule 2 (2) within 90 days of the payment.

The terms of Order 21, Rule 2 (1), in their ordinary meaning do not involve any application by the decree-holder: the decree-holder would comply with the terms of the rule if he were to certify to the Court that money payable under the decree had been paid to him out of Court, and it would then rest with the Court to record the payment in accordance with the provisions of the rule.

The rule imposes a duty upon the decree-holder to certify the payment, and a duty upon the Court upon such certificate being given to record such payment.

Rule 2 (3) provides that a payment which has not been certified as recorded as aforesaid shall not be recognised by any Court executing the decree.

The provision in Rule 2 (3) no doubt was inserted for good reasons known to the Legislature, and it is obvious that the provision must tend to simplify and expedite the proceedings in the Court executing the decree. There is nothing, however, in sub-rule (3) to indicate that the Legislature intended that the certification of a payment by the decree-holder under sub-rule (1) should be treated as an "application."

The above-mentioned rules contemplate that the decree-holder, to whom a payment has been made by the judgment-debtor out of Court, should certify such payment to the Court within a reasonable time in order that it might be recorded by the Court, and the judgment-debtor is protected by the provision

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that in the event of the decree-holder failing to certify the payment to the Court, the judgment-debtor may apply to the Court for a notice to issue to the judgment-creditor to show cause why the payment should not be recorded as certified, provision being made by Art. 174 of the Limitation Act that such application by the judgment-debtor must be made within 90 days of the time when payment was made. In view of these provisions, apparently it was not thought necessary to provide any specific time within which the judgment-creditor must certify the payment under Order 21, Rule 2 (1).

Having regard to the ordinary meaning of the words used in Order 21, Rule 2 (1), the difference between the procedure under Rule 2 (1) and the procedure under Rule 2 (2) and the above-mentioned scheme of the provisions contained in the said rules, their Lordship's are of opinion that the mere certification by the decree-holder of a payment to him out of Court by the judgment-debtor under Order 21, Rule 2 (1) is not an application within the meaning of Art. 181 of the Schedule of the Indian Limitation Act.

It was, however, argued on behalf of the appellant that in this case the respondents had not confined themselves to certifying the payments in question, but that they had, in fact, made an "application" within the meaning of Art. 181, and reference was made to the document filed by the respondents on the 8th December, 1924.

It is true that the document is headed "Application under Order 21, Rule 2, Civil Procedure Code," and it is in the form of a petition wherein the facts relied upon are set out.

In paragraph 4, however, it is stated that the bank decree-holder certifies the said payments made to it and prays that the Court may be pleased to record the same accordingly under Order 21, Rule 2 (1) of the Civil Procedure Code.

This paragraph contains the certificate which is required by Order 21, Rule 2 (1), and the prayer is no more than a request that the Court will carry out the provisions of the rule and record the payments. It is clear that the respondents intended to certify and did certify in accordance with the above-mentioned rule, and the mere fact that the document was called an "application" and was in the form of a petition cannot, in their Lordships' opinion, alter the real nature of the procedure and convert what was really no more than a certificate

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of certain payments into an "application" within the meaning of Art. 181.

It was further argued that in some cases in India it had been held that where a decree-holder had proceeded to certify a payment which had been made out of Court in satisfaction of a decree, he had taken a step-in-aid of execution of the decree within the meaning of Art. 182 (5) of the Indian Limitation Act, and that if such procedure were held to be an application for the purpose of Art. 182 (5), it must also be an application within the meaning of Art. 181.

Their Lordships do not think it necessary in this appeal to express any opinion with reference to the cited cases dealing with matters which were held to be steps-in-aid of execution of a decree or order.

Each case must depend upon the facts relating thereto, and it is sufficient for the disposal of this appeal for their Lordships to hold that the document of the 8th December, 1924, was in effect no more than a certification of payments by the respondents, and that such certification was not an application within the meaning of Art. 181 of the Indian Limitation Act.

Consequently, the application for execution of the decree by reason of the payments certified and recorded was not time-barred.

The above-mentioned conclusion renders it unnecessary for their Lordships to consider the question relating to the alleged acknowledgments in writing, and it should be noted that the learned counsel were not called upon to present their arguments in respect of that question.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.

Ma Ngwe Naing .. *Appellant** (*Plff.*)

v.

Maung Tha Maung .. *Respondent* (*Deft.*).

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Ma Ngwe Naing
v.
Maung Tha Maung.

Benami—Proof of—Onus—Quantum—Father—Transfer to minor daughter by, in lieu of her share of inheritance—Benami nature of—Test—Evidence—Admission prior to suit by father that he held possession on her behalf—Value of—Possession by father consistent with legal title—What amounts to—Limitation plea if can be founded on—Fraudulent benami—Plea by transferor of—Maintainability—Fraud carried out—Effect—Proof of such plea required—Nature of.

The plaintiff was the daughter, and the only issue, of the defendant by his first wife. She became entitled, on the death of her mother and on the remarriage of the defendant, to a share of the joint marital property of her father and deceased mother. Shortly after his remarriage, the defendant took steps to carry out a legal partition and to vest the appropriate share in the plaintiff He executed a formal registered deed which recited that the father divided and gave outright possession by way of inheritance of one-fourth of the whole estate to plaintiff for the mother's share, and that the paternal grandmother of the plaintiff undertook to take charge of the plaintiff's share until the plaintiff's majority. In due course the grandmother applied for a grant of letters of administration to the plaintiff's deceased mother, alleging that the father had made over the guardianship and one-fourth share due to his deceased wife in trust for her daughter. Letters of administration of the estate of plaintiff's deceased mother in general form were granted to the grandmother. The grandmother, acting on behalf of the plaintiff, with the approval and assistance of the defendant, took proceedings to have an attachment of the property in execution of a decree against the defendant set aside and succeeded. The plaintiff lived with her maternal grandmother; the property transferred continued in possession of the defendant, who received its rents and profits but contributed to the plaintiff's support

In a suit by the plaintiff for recovery of possession of the property in question from the defendant, *held*, that the onus lay heavily on the defendant to show that the transaction evidenced by the registered partition deed was fictitious and was intended to defraud his creditors and that he failed to discharge that onus.

The retaining of the possession and management by the father in the circumstances of the daughter being an infant and the guardian of the property being the paternal grandmother, appears entirely consistent with the possession and management being conducted in accordance with the legal title that is for and on account of the daughter; and no title would be acquired by the father under the law of limitation

For the purpose of ascertaining the good faith of the parties to the deed, the expressed intention of giving one-fourth should alone be looked at, and not the share to which the daughter would legally be entitled

*P.C. Appeal No. 153 of 1927. 30th November, 1928.

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An admission made prior to suit and on the occasion of a demand for possession made by the plaintiff and her uncle that he held possession on her behalf and would restore it to her is an important piece of evidence in considering whether the partition was a benami transaction or not.

Quaere: Whether, where a grantor alleges that a transaction apparently real was really fictitious, and was for the purposes of effecting a fraud, and the fraud was completed, he can be heard in a Court of law to say that the transaction was other than what it appears to be. *Held*, that facts that can be relied upon in support of such a plea make it the duty of the Court adjudicating on the allegation of such a grantor to see that he proves by cogent evidence the averment that he makes.

Appeal No. 153 of 1927 from a decree of the High Court of Judicature at Rangoon (Heald and Chari, JJ.), dated the 1st June, 1926, reversing a decree of the Court of the District Judge of Tharrawaddy, dated the 2nd July, 1925 and dismissing a suit which he had decreed.

In that suit the appellant claimed to eject the respondent, her father, from a house and six pieces of paddy land which she alleged that he had conveyed to her by a deed, dated the 15th January, 1904.

The main questions in the appeal were (1) whether the respondent had proved that deed to have been made merely for the purpose of defeating his creditors and with no intention of passing any property, and if not (2) whether the appellant's claim on the deed was not barred by limitation and the respondent had not acquired a good title to the suit properties by adverse possession.

Both Courts in India held that the defendant was entitled. in resisting the plaintiff's claim, to plead the benami nature of the transaction even though it were a fraud on his creditors. The District Judge held that the defendant (respondent) had possession of the lands even after the partition, but he held that the respondent's possession was throughout on behalf of the plaintiff until the year before the suit, with "no proved act of adverse possession," and that there was no bar of limitation under Art. 144 of the Indian Limitation Act which he held was the article applicable. He concluded his judgment in the following words:

"The gift to plaintiff in her minority not having been proved to be fraudulent it must be assumed that defendant continued in possession as plaintiff's natural guardian and on her behalf, as proved by evidence. Mr. Guha for the plaintiff has urged that in such a case no question of limitation arises and refers to the notes on Art. 144 of the Limitation Act under the head 'Possession of guardian or other person' at page 655 of Rustomji's Law of Limitation (3rd Edition), which runs: 'As the possession of a guardian is the possession of the ward, if the

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guardian retains possession after the ward has come of age, he is presumed to retain it as guardian until something has been done to alter the character of his possession.' Further, it seems that the full period of 12 years must run from the *time of that change*."

On appeal the High Court held it "proved beyond doubt that at the time of the alleged partition the defendant was heavily in debt and that shortly afterwards he absconded in order to avoid his creditors" and that the transaction was not a genuine transfer of the property. Their judgment ended as follows:

"The transaction was a mere pretence arranged between the defendant and his mother for the purpose of defrauding defendant's creditors and we have no doubt that that fraud was carried into effect We are satisfied, therefore, that no title to the property was intended to pass to the plaintiff, and that the transaction was not a genuine transfer of property. But it is contended that defendant is not entitled to plead his own fraud in defence to plaintiff's suit The decision in the case of *Maung Tin* v. *Ma Mai Myint*[1] is a sufficient answer to that contention Defendant is in possession of the property and has always been in possession since the date of the alleged transfer. If no title passed by the deed there is no presumption that he was in possession on behalf of plaintiff, and his possession would presumably be adverse to her The question is whether or not he is entitled to prove that the transaction evidenced by the deed was a mere pretence and that no title was intended to pass by it We are of opinion that he is entitled to prove it, at any rate for the purpose of showing that his possession was adverse, if not for the purpose of establishing that he is still owner, and that on the facts proved and admitted there can be no doubt that his possession has always been adverse. We therefore find that plaintiff's suit was barred by limitation and we set aside the judgment and decree of the Lower Court and dismiss plaintiff's suit"

L. De Gruyther, K.C. and *A. Pennell* for appellant.

A. M. Dunne, K.C. and *E. B. Raikes* for respondent.

De Gruyther, K.C.—In Burma the period of majority is 18 years. It must be assumed that the defendant continued in possession as plaintiff's natural guardian and on her behalf. Art. 144 of the Indian Limitation Act applies, and the time runs only when the possession becomes adverse. As between guardian and ward there can be no adverse possession.

The decision in *Maung Tin* v. *Ma Mai Myint*,[1] upon which both the Lower Courts relied, is erroneous.

[*Lord Atkin.*—It is quite a common thing to settle property so as to put it beyond the reach of creditors.]

[*Lord Phillimore.*—Creditors would be equally defeated by a *bona fide* transfer.]

1. (1921) 11 L.B.R. 83.

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The learned Judges of the High Court rely on the partition deed for the purpose of showing adverse possession by the defendant.

[*Lord Phillimore.*—I should have thought that the defendant held the property in trust for your client.]

If it was a *bona fide* transaction, the defendant was acting as the plaintiff's guardian, and no question of adverse possession arises.

Pennell follows: See *Ma Paing* v. *Maung Shwe Hpaw*,[2] which is the latest decision as to the rights of parties under Burmese Buddhist Law.

[*Lord Phillimore.*—It looks from the authority you have cited that in Burma there is a community in everything, and that the result of marriage between a Burmese Buddhist couple is that all the property which each or either possesses at the time of marriage becomes the property of the marriage.]

The main question in the case is, whether the defendant can plead his own fraud. The Lower Courts have answered the question in the affirmative, relying on *Maung Tin* v. *Ma Mai Myint*.[1]

[*Lord Phillimore.*—That case is distinguishable. A man can show that a transaction was benami. He can always get relief as a defendant.]

See *Montefiori* v. *Montefiori*,[3] where Lord Mansfield said that "no man shall set up his own iniquity as a defence, any more than a cause of action." I rely on the case of *Roberts* v. *Roberts*,[4] where it was ruled that when the deed is one under which an estate has passed, and the party conveying is *particeps criminis*, privy to the illegal purpose, he cannot defend himself against an ejectment upon the ground of his own fraud in executing the conveyance.

The judgment of Jenkins, C.J., in *Sidlingappa* v. *Hirasa*[5] supports my contention.

[*Lord Phillimore.*—That case is distinguishable. The learned Chief Justice says that a party to a fraud cannot, as plaintiff, plead the fraud, but that a defendant can get relief, notwithstanding his fraud.]

See Mayne's Hindu Law, 9th Edition, para. 446.

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1. (1921) 11 L.B.R. 83.
2. (1927) I.L.R. 5 Rang 296*(F.B.).
3. (1762) 1 Wm. Bl 363
4. (1819) 2 B. & Ald. 367: 106 E.R. 401.
5. (1907) I.L.R. 31 B. 405.

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[*Lord Atkin*.—A benami transaction may simply be what in this country is a trust, and be perfectly honest.]

The decision in *Maung Tin* v. *Ma Mai Myint*[1] lays down that even if your fraud is successful, you can plead it. I submit that is not sound law.

[*Lord Phillimore*.—After all, this particular point does not arise for decision here.]

The defendant in the present case is estopped from setting up the fraudulent nature of the transaction.

Dunne, K.C. (for the respondent-defendant): There are many decisions in India to the effect that a defendant can plead his own fraud. The judgment of Jenkins, C.J., in *Sidlingappa* v. *Hirasa*[5] is wrong.

[*Lord Phillimore*.—In some cases, even when fraud has been accomplished, a person, as a defendant, has been allowed to set up his own fraud.]

Indian Courts are Courts of Law as well as of Equity.

[*Lord Atkin*.—In the present case, the plaintiff is not altogether a volunteer. She had a right to a share in the inheritance, and we cannot call her a mere volunteer.]

[*Lord Phillimore* refers to *Roberts* v. *Roberts*[4] and says that that case may well stand, not on the ground of fraud, but of illegality. There, *A* conveyed land to *B* in order to give him a colourable qualification to kill game, and so defeat an information against him, and it was held that *A* had no defence in an ejectment for the land bought by *B*.]

I rely on the decisions in *Ram Suran Singh* v. *Mt. Pran Peary*,[6] *Sreemutty Debia Chowdhrain* v. *Bimola Soonduri Debia*[7] and *Babaji* v. *Krishna*[8] as laying down that a party is entitled to show the real truth of the transaction. Here, I am defending, and not enforcing the deed.

[*Lord Phillimore*.—You are in possession; the plaintiff seeks to eject you; you say the deed is a sham and that she cannot recover. Your case would have been stronger if the plaintiff had been of full age or the guardian had been a party or privy to the fraud.]

[*Lord Atkin*.—In your case the fraud has been successful. It has enabled you to relieve the property from attachment.]

1. (1921) 11 L.B.R. 83.
4. (1819) 2 B. & Ald. 367: 106 E.R. 401.
5. (1907) I.L.R. 31 B. 405
6. (1870) 13 Moo. I A 551.
7. (1874) 21 W.R. 422.
8. (1893) I.L.R. 18 B. 372.

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The principle cannot vary, whether the fraud has been carried out or not.

[*Lord Phillimore.*—The overt act of fraud was committed when you executed the deed.]

[*Lord Atkin.*—According to the English decisions, you can recover if the fraud has in no way been carried out, but the property cannot be recovered back if the fraudulent object had been carried into effect.]

Reads from the report in *Babaji* v. *Krishna.*[8]

[*Sir Lancelot Sanderson.*—That case was cited before Jenkins, C.J., in *Sidlingappa* v. *Hirasa.*[5]]

[*Lord Phillimore.*—The report in *Babaji* v. *Krishna*[8] does not tell us if the fraud was successful or not.]

I submit that when a defendant in possession seeks to show the real nature of a transaction to defend his possession, there is no distinction in principle between cases where the fraud has been successful or not.

[*Lord Atkin.*—In the present case, the fraud has been successfully carried out. The defendant now pleads that the deed was fraudulent. Can he be allowed to do so?]

[*Sir Lancelot Sanderson* refers to *Symes* v. *Hughes,*[9] which case was relied on by Couch, C.J., in *Sreemutty Debia Chowdhurain* v. *Bimola Soondurce Debia.*[7]]

The decision in *Preonath Koer* v. *Kasi Mahomed Shasid*[10] is in my favour, as laying down that in a suit for possession, the defendant is not debarred from pleading the benami and fraudulent nature of the transaction, notwithstanding that the fraud contemplated had been carried into effect.

[*Lord Phillimore.*—That head-note in *Preonath Koer* v. *Kasi Mahomed Shasid*[10] is the strongest case for you.]

In India the Courts have definitely taken the view that when a party to a fraud comes in as a plaintiff and sets up his own fraud, the Court will refuse him relief and, to use a common expression, "let the estate lie where it falls."

[*Lord Phillimore.*—Was the fraud successful in *Sreemutty Debia Chowdhurain* v. *Bimola Soonduree Debia*[7]? They seem to put it quite generally in that case.]

I rely also on Mookerji, J.'s judgment in *Jadu Nath Poddar* v. *Rup Lal Poddar*[11] and *Girdharlal Prayagdatt* v. *Manikkam-*

5. (1907) I.L.R. 31 B. 405.
7. (1874) 21 W.R. 422.
8. (1893) I.L.R. 18 B. 372.
9. (1870) 9 Eq. 475.
10. (1903) 8 C.W.N. 620.
11. (1906) I.L.R. 33 C. 967.

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ma,[12] where the decision of Jenkins, C.J., in *Sidlingappa* v. *Hirasa*[5] is distinguished.

[*Lord Atkin.*—In *Jadu Nath Poddar* v. *Rup Lal Poddar*[11] Mookerji, J., refers to section 84 of the Indian Trusts Act.]

I submit that the Trust Act would not apply at all in the case of a benami transaction.

[*Lord Phillimore.*—*Ram Suran Singh* v. *Mt. Pran Peari*[6] looks in your favour, Mr. Dunne.]

[*Lord Atkin.*—A benami transaction resembles a transfer in the name of a nominal party. There is nothing necessarily wrong or dishonest about it.]

Refers to *Maung Tin* v. *Ma Mai Myint,*[1] upon which both the Lower Courts relied.

[*Lord Atkin.*—The fraudulent purpose was actually accomplished there.]

[*Lord Phillimore.*—That case *Maung Tin* v. *Ma Mai Myint*[1] is absolutely undistinguishable from the present case.]

Here, it was all a one-sided transaction by the defendant; the plaintiff was never a party to the contract. The defendant wants to show that it was never the intention to pass a real title to the plaintiff, and he cannot be estopped from doing so. The principle underlying the decisions is that a defendant cannot be estopped from showing the real facts. Different considerations apply to the case of a plaintiff and the Court will not lend its aid to enable the grantor who has defrauded his creditors to get his property back from the grantee. The case of a defendant, however, stands on an altogether different footing.

The maxim *in pari delicto potior est conditio possidentis* applies only when both parties are privy to the fraud. I submit that when the plaintiff comes in, claiming title under the deed, I can show that it was only an ostensible title.

E. B. Raikes follows: *Montefiori's case,*[3] upon which the other side relied, is based on the ground of estoppel, *vide* the judgment of the Lord Chancellor in *Jorden* v. *Money.*[13]

[*Lord Phillimore.*—When does title to property pass in India?]

[*Lord Atkin.*—The title passes when the deed is signed with the intention of passing the property, and if it is not registered,

1. (1921) 11 L.B.R. 83.
3. (1762) 1 Wm Bl. 363.
5. (1907) I.L.R. 31 B 405.
6. (1870) 13 Moo. I.A. 551.
11. (1906) I.L.R. 33 C. 967 at 982.
12. (1913) I.L.R. 38 B 10.
13. (1854) 5 H.L. Cas 185.

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it is ineffective, but on registration it would operate as from the date when it was executed.]

We submit that the deed here was a mere sham, and the property never passed to the plaintiff.

Refers to Mayne's Hindu Law, Chap. XIII, "Benami Transactions," para. 446. That paragraph is quoted, word for word, with approbation, in the judgment of Lord Atkinson in *Pethaperumal Chetty* v. *Muniandi Servai*,[14] and as it is a decision subsequent to *Sidlingappa* v. *Hirasa*,[5] I submit that the judgment of Jenkins, C.J., in the Bombay case is no longer good law.

De Gruyther, K.C., in reply, referred to *Cecil* v. *Butcher*,[15] where Sir Thomas Plumer, M.R., laid stress upon the fact that the deed had not been acted upon and the illegal object had not been carried into execution.

The decision in *Sreemutty Debia Chowdhurain* v. *Bimola Soondurec Debia*[7] is distinguishable, as the illegal object there had not been effected, and the learned Judges merely followed the pronouncement of the Privy Council in *Ram Suran Singh* v. *Mt. Pran Peari.*[6]

[*Lord Phillimore.*—The fraudulent object was not successful there, but it was attempted to be effected.]

I concede that *Preonath Koer* v. *Kasi Mahomed Shasid*,[10] cited by my learned friend, Mr. Dunne, is against my contention.

The authority of Jenkins, C.J.'s judgment in *Sidlingappa* v. *Hirasa*[5] is absolutely untouched by anything said by the Privy Council in *Pethaperumal Chetty* v. *Muniandi Servai*,[14] where the fraud had failed. The particular question now argued was not discussed by the Privy Council, and therefore their Lordships cannot be said to have impliedly overruled *Sidlingappa* v. *Hirasa.*[5]

30th Nov. 1928.—Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—This is an appeal from the High Court at Rangoon allowing an appeal from a decree of the District Judge of Tharrawaddy, made in favour of the plaintiff, the present appellant. The suit was brought by the plaintiff, Ma Ngwe Naing, against her father, the defendant, Maung Tha Maung,

5 (1907) I.L.R. 31 B. 405.
7 (1874) 21 W.R. 422.
6 (1870) 13 Moo. I.A. 551.
10. (1903) 8 C.W.N. 620
14. (1908) L.R. 35 I.A. 98 I.L.R. 35 C. 551: 18 M.L.J. 277 (P.C.).
15. (1821) 2 J. & W. 564: 37 E.R. 744.

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claiming possession of certain lands, of which she was the registered owner. It is not disputed that the father, by deed, dated January 15, 1904, purported to have made a partition of property and to have conveyed the property in question to his daughter. He alleges, however, that the transaction was a fictitious transaction intended merely to defeat his creditors. The High Court reversing the District Judge have so held; the daughter has appealed.

Maung Tha Maung married as his first wife Ma Pu; the plaintiff is the only issue of the marriage. In February, 1903, Ma Pu died; the plaintiff was then 8 or 9 years old. Later, in 1903, the defendant married Ngwe Hlaing. On the re-marriage the plaintiff undoubtedly became entitled to a share of the joint marital property of her father and deceased mother. Three or four months after the marriage the father took all the steps necessary to carry out a legal partition and to vest the appropriate share in the daughter. The family were consulted. Lugyis were summoned to authenticate the partition, and a formal document was executed by the father on January 15, 1904, which is Exhibit I. It recites that the father divides and gives outright possession by way of inheritance of one-fourth of the whole estate to his daughter for the mother's share, and that Ma Shwe Hnit, the grandmother of the daughter, undertook to take charge of the daughter's share until the daughter's majority. It then defines the share, which consisted of 78 acres of paddy land, estimated in the deed as worth 3,500 rupees, and a house and compound worth 500 rupees, and concludes with formal words of conveyance. The document was duly registered. In due course the grandmother petitioned the Court of the District Judge for a grant of letters of administration to the deceased Ma Pu, alleging that the father had made over the guardianship and one-fourth share due to his deceased wife in trust for the daughter. On February 20, letters of administration of the estate of Ma Pu in general form were granted to Ma Shwe Hnit. In 1908 the father's creditors who had obtained decrees against him by way of execution attached the property in question. The grandmother, acting on behalf of the daughter, with the approval and assistance of the father, took proceedings to have the attachment set aside and succeeded. The father subsequently made a composition with his creditors. About the time of the deed of partition the plaintiff went to live with her maternal grandmother, Shwe Pai, with whom apparently she continued to live until her marriage in

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1924. She attained her majority in 1911. During the whole of this period the father, as found by the Trial Judge, continued in possession of the property, receiving the rents and produce. He, however, contributed to the daughter's support. The Trial Judge finds that about 1915 the daughter went with her maternal uncle and another witness to her father to demand possession of the lands, and received an assurance from the father that the property was safe and would be restored to her. Representations had been made in 1924 and preceding years by the father to various revenue officers that the lands in question were the daughter's and that he was leasing them on her behalf. The father gave evidence to the effect that at the time of the alleged partition he owed 30,000 rupees, that he executed the document to save the property from his creditors, and that under it he transferred all his property to his daughter's name. He says that after the partition he absconded for a time to avoid his creditors. On return he was sued and was imprisoned for debt. He made an unsuccessful application to be declared an insolvent. After the creditors had failed in their attachment of the lands in suit he says he compounded his debts of Rs. 30,000 for Rs. 3,000. He says he always remained in possession, and was supported by several witnesses, who spoke to acts of ownership at all material times by the defendant. The learned Trial Judge found that the defendant had not discharged the onus of proof that the transaction was fictitious. The High Court, on the contrary, find that the transaction was wholly fictitious. They rely upon the circumstances that, as they find, the defendant was heavily indebted at the date of the deed; that the property assigned amounted to nearly the whole of the defendant's assets; that the guardian appointed was not the daughter's maternal grandmother with whom she lived, but the father's mother, and that the defendant continued in possession of the land throughout. They further came to the conclusion that the defendant's possession was throughout adverse to his daughter, and that he had acquired a title by limitation. While appreciating the grounds of suspicion which the above circumstances afford, their Lordships are of opinion upon consideration of the whole case that the defendant failed to discharge the onus which lay heavily upon him in the circumstances to show that the transaction was fictitious. The defendant's case is that the partition was intended to defraud his creditors. He has to admit that this fraud, if it was one, was successful; that he repelled the creditors' attempt to attach the

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property, procuring his daughter's title to be set up, and that thereupon the frustrated creditors accepted a small composition.

Their Lordships listened to a forcible argument that in such circumstances, where a grantor alleges that a transaction apparently real was actually fictitious, and was for the purpose of effecting a fraud, and the fraud was completed, he cannot be heard in a Court of Law to say that the transaction was other than what it appears to be. There have been various decisions on this point in India which appear to conflict. Their Lordships find it unnecessary to decide the point. But they have no doubt that facts than can be relied on in support of such a plea make it the duty of the Court adjudicating on the allegation of such a grantor to see that he proves by cogent evidence the averment that he makes. The present case differs from the usual form of alleged benami transactions in that there was an undoubted legal right of the transferee existing independently of the impugned transaction to receive a transfer of some property. Their Lordships think it probable that the father was at the date in question in debt, though not to the extent suggested of 30,000 rupees. Such a condition of affairs would be as likely to lead to the father making a real partition as a fictitious one. In these circumstances again it may well be that intending the property really to vest in the daughter, and so be removed from the creditors, he may have made in the partition a generous estimate of a fourth. It was contended in argument that in any case the share of an only daughter would be one-half. Their Lordships consider that for the purposes of estimating the good faith of the parties the expressed intention of giving one-fourth should alone be looked at. But it is obvious from the evidence that the defendant is inaccurate when he says that the transfer was of all his property, and the excessive share given to the daughter does not in the circumstances appear to be inconsistent with a genuine transaction.

Similarly, the retaining of the possession and management by the father in the circumstances of the daughter being an infant, and the guardian of the property being the paternal grandmother, appears entirely consistent with the possession and management being conducted in accordance with the legal title that is for and on account of the daughter. In this respect it would appear unfortunate that the learned Judges of the High Court have not referred to the admission in 1915 by the father to his daughter and her uncle found by the Trial Judge on evidence which their Lordships find no reason to doubt. If as

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the Trial Judge found, in their Lordships' opinion correctly, the possession of the father is in accordance with the legal purport of the deed, no title would be acquired by the father under the law of limitation. For these reasons their Lordships agree with the learned Trial Judge in thinking that the defendant failed to establish his defence. Their Lordships therefore are of opinion that the appeal should be allowed and the decree of the learned Trial Judge restored, and will humbly advise His Majesty accordingly. The appellant should have her costs here and in the High Court.

Solicitor for appellant: *J. E. Lambert.*

Solicitors for respondent: *Bramall & Bramall.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE TIRUVENKATACHARIAR.

V. R. Venkatarama Aiyar .. *Appellant** (*2nd Deft.*)

v.

T. Gopalakrishna Pillai and another .. *Respondents* (*Plff. and* 1*st Deft.*)

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Transfer of Property Act, S. 84—Purchaser of equity of redemption—Right to tender mortgage amount—Offer by purchaser to give cheque or cash by cashing the cheque—Refusal by mortgagee to have any dealings with the purchaser—Legality and validity of the offer—Contract Act, S 38—Tender, if valid so as to stop the running of interest—Estoppel of mortgagee to object to the form of payment—Civil Procedure Code, O 41, R 4—Decree against mortgagor and the purchaser—Appeal by the purchaser alone—Power of Court to set aside the decree against the mortgagor also.

A purchaser of the equity of redemption is entitled in law to tender the mortgage amount.

Where the purchaser of the equity of redemption had in his bank the full amount which was due to the mortgagee and went with his cheque book ready to give the mortgagee a cheque, or cash by cashing the cheque at once if the mortgagee wanted cash, for the full amount due on the mortgage, but the mortgagee prevented him from doing so by refusing to have any dealings with him,

Held, that the offer of performance was legal and valid under S. 38 of the Contract Act, as the mortgagee did not object to the form of the payment but refused to have the payment in any shape, and that it amounted to a valid tender under S. 84 of the Transfer of Property Act so as to stop the running of interest after that date.

Held also that the mortgagee was estopped by his own conduct from claiming that interest would not cease to run.

Where the Lower Court overruled the plea of valid tender and granted a decree to the mortgagee against both the mortgagor and the purchaser

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*C. C. Court Appeal No. 28 of 1927. 24th September, 1928.

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of the equity of redemption, and the latter alone filed an appeal impleading the mortgagor also as a respondent to the appeal, and the Appellate Court allowed the appeal reversing the decree of the Lower Court,

Held, that the Court had power under O. 41, R. 4 of the Civil Procedure Code to set aside the decree against the mortgagor also, though he had not preferred an appeal, as the ground of appeal was common to both the defendants.

Appeal against the decree of the City Civil Court, Madras in Original Suit No. 165 of 1926.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for appellant.

T. Pattabhirama Aiyar, T. P. Ramachandra Aiyar and *C. Venkatasubbaramiah* for 1st and 2nd respondents.

The Court delivered the following

JUDGMENT:—The appellant in this case is the 2nd defendant. The facts not disputed are, the plaintiff had lent the 1st defendant a sum of Rs. 12,500 on an equitable mortgage of his house by means of a promissory note and pledge of title-deeds as security. In the beginning of March, 1925 plaintiff was informed that the 1st defendant was selling the house to the 2nd defendant under an arrangement that the 2nd defendant should discharge the mortgage. On 10th March, 1925, 1st defendant paid Rs. 900 to P.W. 2 on behalf of the plaintiff in full discharge of the interest due on the mortgage and undertook to pay the principal within a week and that if the principal was not so paid further interest would accrue until the date of payment. 2nd defendant bought the house on 5th March, 1925. According to him he made a valid tender of Rs. 12,500 to the plaintiff on 16th March, 1925 within a week of grace but the plaintiff refused to have anything to do with him. According to the plaintiff there was no valid tender. The principal sum was deposited in the High Court on 22nd October, 1925. Plaintiff in this suit sues for interest Rs. 925 which he claims due to him as having accrued between 10th March, 1925 and 22nd October 1925. The Lower Court gave a decree for the sum against both the defendants personally. The 2nd defendant appeals.

The main contention, of course, is that as the plaintiff refused his valid tender made within a week of grace plaintiff is not entitled to any interest, and the chief point for decision is what happened on the 16th March and whether there was then a valid tender of the whole sum due. 2nd defendant was the purchaser of the equity of redemption and as such was of course entitled in law to tender the mortgage amount.

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The alleged tender was made at the Cosmopolitan Club. Plaintiff as P.W. 1 admits that the 2nd defendant, D.W. 3 and the agent of 1st defendant came to him at the Club, that the 2nd defendant asked him to receive the money and give him receipt and that he replied "I will take it from you if Sami Naidu (the mortgagor) says so." Later on in his deposition he says, "He (*i.e.*, 2nd defendant) did not bring money on the 16th or show it to me": that is all the account the plaintiff gives of this incident, and his is the only evidence on his side about it. How he knew that no money was brought he does not explain. 2nd defendant's version as D.W. 2 is that the three persons abovenamed went to the Club and told plaintiff that they had brought the money, that plaintiff asked "Who are you"; 2nd defendant said "I am the purchaser as you know"; plaintiff then refused to receive the money saying "I have nothing to do with you. The mortgagor must come." 2nd defendant says he had the money Rs. 7,000 in cash and the rest in the form of a draft on the Imperial Bank, that he did not show the plaintiff all the money as he would not listen to the offer, but showed him his "bulging pocket" and said he had it. Two witnesses on his side, D.Ws. 3 and 4 state that the plaintiff refused to receive the money. We regard the evidence of D.W. 3, a vakil of the High Court and a disinterested party, as most reliable on this point. He says that when they told plaintiff they had come to pay he said, "Who are you? I do not know you. I had no dealings with you. My transactions were with the 1st defendant." D.W. 3 was not cross-examined on this part of his evidence and we accept his account. From this it is clear that the plaintiff refused emphatically to have any dealing with the 2nd defendant. At the bar his learned Advocate sought to defend him by alleging that he really did not know who the 2nd defendant was. It is highly significant that plaintiff never gave that reason himself in the witness box and had he ventured to do so, he would have been at once confronted with his own statements in the plaint paragraph 6 that in the beginning of March (obviously some date before the 16th) he was informed of the sale of the house to the 2nd defendant and of the arrangement that 2nd defendant was to discharge the mortgage, and in paragraph 8 that he actually himself sent a letter to his vakil with whom he deposited the title-deeds to hand them over to the 2nd defendant, and again in paragraph 9 where he clearly admits that he was looking to the 2nd defendant as well as the 1st defendant to pay him the

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mortgage amount. P.W. 2 says that he himself told the plaintiff on the 10th March of the sale in favour of the 2nd defendant. It appears to us futile for the plaintiff to argue that he did not know who the 2nd defendant was. His profession of ignorance of who the 2nd defendant was when 2nd defendant came to the Club was therefore a mere pretence in order to give a colour of justification to his point blank refusal to negotiate. We are quite satisfied that the plaintiff knew perfectly well who 2nd defendant was and that he knew him to be the purchaser of the property. If the reason which the plaintiff gives in his evidence for not dealing with the 2nd defendant, namely, that the mortgagor must also consent, had been really stated by him, then that was also not the true reason but a mere excuse to cover his refusal to deal with the 2nd defendant at all. The 1st defendant's agent D.W. 4 was then present with the 2nd defendant and the plaintiff's statement that he did not then know him to be an agent of the 1st defendant is wholly disingenuous since this man was present at the previous payment of Rs. 900 interest to P.W. 2 on behalf of the plaintiff. It is significant of the plaintiff's real attitude that he does not claim that he told the 2nd defendant that he should pay the amount to P.W. 2 whom on his own case he had authorised to receive the money. It is quite obvious that he was not going to receive the money from the 2nd defendant under any circumstances or at any time or place. The real reason for his pettish refusal to receive the money appears to be pique because he had himself expected that 1st defendant would sell the house to him and annoyance at having been forestalled by 2nd defendant.

The plaintiff's determination to have nothing whatever to do with the 2nd defendant in this matter is manifested by his subsequent conduct. Foiled in his attempt to pay the plaintiff at the Club, the 2nd defendant sent him two registered letters enclosing a cheque for Rs. 12,500, namely, Exhibit III on 19th March, 1925 and Exhibit IV on 23rd March, 1925; of both of these the plaintiff refused to take delivery. These he refused, he says, because the covers bore no indication that they contained a cheque. Quite obviously therefore he did not know that they did not contain cheques for the principal plus whatever interest he then thought was due to him in payment of the debt. It is perfectly clear that he was determined not to receive payment from the 2nd defendant under any circumstances. It is not without significance that the plaint omits to mention both the incident at the Club and these subsequent letters. We are satisfied from the evidence that the plaintiff categorically refused to

deal with the 2nd defendant at all or to entertain even the idea of receiving the money from him, that he thus put it out of the power of the 2nd defendant to pay the debt.

It is contended for the plaintiff that, even so, such a refusal to treat with the 2nd defendant will not avail the 2nd defendant unless he actually himself made a legal tender which the plaintiff was bound to accept and it is argued that the 2nd defendant did not as a matter of fact have the money with him. 2nd defendant says he had it in the form of cash and a draft, and that when the plaintiff refused to receive it he paid most of the cash and the draft into the Indian Bank the same day. His Pass Book shows that on 16th March, 1925 he got a cheque book and paid in Rs. 4,200 in cash and Rs. 6,680 by draft; we are not altogether satisfied that he had time after the interview at the Club, said to have been at about 3 P.M. (*see* Ex. D), to have paid in this sum to the Indian Bank. It appears to us more probable that he had before he went to the Club already paid in these sums into the Bank and that what he took with him to the plaintiff was his cheque book. This conclusion is supported by the evidence of P.W. 2 to whose house the party had gone just before going to the Club expecting to find the plaintiff there and to pay him there. P.W. 2, whose respectability gives his evidence much weight, deposes that 2nd defendant then told him he had his cheque book with him and that he had already put the money into the Bank and that he had no money with him. We are not satisfied that the 2nd defendant has told the truth in this matter and believe that, realising that his offer of a cheque might not be held to be a legal tender, he has endeavoured to improve upon the truth. However we are satisfied that if he had not the cash with him, he had his cheque book and that he had not less than Rs. 12,500 in the bank so that he could then and there have written out a cheque for the full amount which would have been honoured. He was able and willing to pay by cheque if plaintiff would accept a cheque or by cashing the cheque at once if plaintiff wanted cash. The facts as found by us therefore are that the 2nd defendant was entitled in law to pay up this debt, that he went with his cheque book to the Club ready to give the plaintiff a cheque or cash for the full amount and that the plaintiff prevented him doing so by refusing point blank to have any dealings with him. What is the effect in law of such a position in fact? The law in India is to be found in section 38 of the Contract Act and section 84 of the Transfer of Property Act. So far as section 38 of the

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Contract Act governs the case, we are satisfied for reasons given that the 2nd defendant made an offer of performance which was not accepted. The plaintiff argues first that the offer was not a legal offer, in other words, that the offer, if accepted, would not constitute performance, and secondly that it was not made at the proper time and place and under the circumstances set out in sub-section (2) of the section. His first contention rests on the broad proposition that tender of a cheque is not valid tender. As a universal proposition that is hardly correct. Tender by cheque will be valid tender if the person to whom it is tendered is willing to receive payment by a cheque. But in the present case the negotiations never got so far. The plaintiff refused at the outset to receive the money in any form or shape. It was open to him, had he allowed the matter to go on and the 2nd defendant had tendered a cheque, to refuse the cheque and demand cash, and there was still time for the 2nd defendant to go and bring cash. But instead of that he refused to have the payment in any shape and by this tactics put it out of his power to receive payment in cash and, therefore, to object now to the form of the payment. It is quite clear from the evidence that his objection was not to the form of the payment but to payment in any form. Where a party thus refuses to entertain the idea of payment at all and puts it out of power of the tenderor to offer payment in a manner acceptable to the creditor, the offer of performance by a person then able to carry out the promise in its entirety is a valid tender in spite of the form of it being itself not legal tender. The tender, whether by cash or draft or by a cheque was a valid tender unless the plaintiff refused the form of it; the plaintiff did not refuse the form of it, and therefore it was valid. See, so far as the English law is concerned, *Jones* v. *Arthur*[1] and *Polglass* v. *Oliver*[2]. The same principle has been applied in India. See *Haji Mahomed Mozaffer Ali* v. *Asraf Ali*[3].

As to the second point, it also was not an objection put forward at the time of tender. Plaintiff can object neither to the time nor place. He had been summoned by phone to the negotiations going on in P.W. 2's house and P.W. 2 was holding himself out as under authority from the plaintiff to receive payment although the promissory note had not then

1. (1840) 59 R.R. 833. 2. (1831) 149 E.R. 7.
3. (1914) 25 I.C. 93.

been endorsed to him. Plaintiff had refused to go to P.W. 2's house. 2nd defendant therefore could no less than pursue the plaintiff to the place where he was. As to the reasonable opportunity of ascertaining that the 2nd defendant was able and willing there and then to fulfil his obligation, plaintiff clearly had such an opportunity if he had not himself refused to ascertain anything at all. Under section 38 of the Contract Act, therefore, the 2nd defendant was absolved from responsibility for non-payment.

Does that imply that the running of interest stopped? Section 84 of the Transfer of Property Act says that where a tender has been made of the amount due on a mortgage interest shall cease from the date of the tender. Obviously a party cannot come into Court and say "There was no tender because I refuse to listen to any tender." Here if the 2nd defendant had had the amount in cash and went to the plaintiff intending to offer it and the plaintiff stopped his mouth by refusing to deal with him at all, one could not hold that there was no valid tender which stopped the running of interest. It seems to me to make no difference if the 2nd defendant had instead of cash his cheque book ready to give the plaintiff a cheque for the full amount or to cash that cheque and give the amount in cash according as the plaintiff chose and was prevented from doing so because the plaintiff refused to allow him to deal with him at all and was evidently determined to receive neither cash nor cheque. We are satisfied that there was a valid offer if the plaintiff would have listened to it and that the plaintiff refused improperly to listen and thereby is estopped by his own conduct from claiming that interest will not cease to run. See *Jagat Tarini Dasi* v. *Naba Gopal Chaki*,[4] *Kripa Sindhu Mukerji* v. *Annada Sundari Debi*[5] and *Lal Batcha Sahib* v. *Arcot Narainaswami Mudaliar*.[6] The same principle governs English law. An act equivalent to dispensing with the production of money is a waiver of the necessity of tender. It is equal to saying, "You need not produce the money because I will not take it." See *Thomas* v. *Evans*[7], *Darglas and Phillips* v. *Paluck*[8] and *Ex parte Danks*[9].

No question arises in this case whether the tender was a continuing offer until the money was paid into Court.

4. (1907) I.L.R. 34 C. 305.
5. (1907) I.L.R. 35 C. 34 (F.B.).
6. (1910) I.L.R. 34 M. 320.
7. (1808) 103 E.R. 714.
8. 1 Rev. R. 793.
9. (1852) 42 E.R. 1138

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The 2nd defendant asserted, and the fact was not denied by the plaintiff or put in issue, that from 16th March, 1925 till 22nd October, 1925, 2nd defendant had more than Rs. 12,500 in the bank to meet the demand of the plaintiff at any time if the plaintiff was willing to receive the payment.

We cannot regard the judgment of the Lower Court as satisfactory. It contains many misstatements and misquotations of the evidence. It blames the 2nd defendant for not furnishing circumstances of time and place of tender as called upon within two weeks of the date of framing issues. The order as a matter of fact says "date of payment" and not "date of tender". The Lower Court goes on to remark that the plaintiff had therefore "no means of meeting the 2nd defendant's case that tender was made on the 16th". But that date is clearly stated in the 2nd defendant's written statement and further particulars were given when Exhibits I and III were filed on the 26th and 27th April. There is no question of any surprise being sprung upon the plaintiff. The Judge further seems to regard the principal question to be whether the 2nd defendant took Rs. 12,500 in cash. We have indicated that that was not the principal question. By some curious reasoning which we do not follow the Judge argues that the 2nd defendant could not have had at his disposal more than Rs. 4,200 in cash and Rs. 6,680, the amount of the draft which he deposited in the bank on the 16th. Why the 2nd defendant could not have produced or had in his possession more cash than he paid into the bank we do not see. The Judge twice over misquoted the plaintiff as saying that he did not know the 2nd defendant before. The plaintiff nowhere says so. The Judge further seems obsessed by the idea that the 2nd defendant had no right to make a tender at all unless there was some fresh contract between him and the plaintiff. But the 2nd defendant as the purchaser of the equity of redemption was in law entitled to discharge the mortgage debt without any further contract. The Judge assumes that P.W. 2 was authorised to receive payment for the plaintiff on the 16th but this is wrong. The promissory note was not endorsed for collection to P.W. 2 until the next day. A tender to P.W. 2 on the 16th would not have been a legal tender.

We must hold for reasons already given that there was a valid tender of the money due to the plaintiff on the 16th

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and that interest ceased to run from that date, and the plaintiff has therefore no cause of action. The suit therefore fails and must be dismissed. The 1st defendant has not appealed, but obviously if the interest is not due at all he cannot be held liable in law for it. Moreover as the appeal brought by the 2nd defendant alone is preferred against the whole decree on a ground common to both defendants it may, under Order 41, Rule 4, be set aside against both. We may add that we do not understand why the Judge gave a personal decree against the 2nd defendant. There was in his view no privity of contract between him and plaintiff.

We reverse the decree of the Lower Court and dismiss the plaintiff's suit with costs to 2nd defendant in this Court. We direct that in the Lower Court all parties will pay their own costs as neither plaintiff nor 2nd defendant put forward the whole truth and nothing but the truth. 1st defendant has not appealed.

N.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

M. L. Sivaramakrishna Aiyar .. *Petitioner** (*1st Accused*)

v.

Seshappa Naidu .. *Respondent* (*Complainant*).

Sivaramakrishna Aiyar v. Seshappa Naidu.

Criminal Procedure Code (V of 1898), S 197—Fabrication by Village Munsif of entire record of a civil suit purporting to have been tried and decreed by him under Village Courts Act—Sanction, if necessary—"Committed by him while acting or purporting to act in the discharge of his official duty"—Meaning of.

Sanction is necessary under section 197 of the Criminal Procedure Code before a Court can take cognizance of an offence alleged to have been committed by a Village Munsif in fabricating the entire record of a civil suit which purported to have been tried and decreed by him against the complainant under the Village Courts Act of 1889.

Imperatrix v *Lakshman Sakharam*, (1877) I.L.R. 2 Bom. 481 referred to.

The words "committed by him while acting or purporting to act in the discharge of his official duty" in section 197 of the Criminal Procedure Code mean that the offence must be committed in dereliction of the duty cast upon him as a Judge. Not all such derelictions, however, fall within the scope of the section. The offence must contain an element necessarily dependent upon the offender being a public servant.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order

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*CrR.C No 310 of 1928. 16th October, 1928.
Cr.R.P. No. 248 of 1928.

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of the Court of the Stationary Sub-Magistrate, Kulitalai, dated the 10th February, 1928 in P. R. No. 3 of 1927.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioner.

K. S. Vasudevan for *The Public Prosecutor* on behalf of the Crown.

K. S. Jayarama Aiyar for respondent.

The Court made the following

ORDER.—The petitioner is a Village Munsif, and he applies for the revision of an order passed by the Stationary Sub-Magistrate of Kulitalai in P. R. No. 3 of 1927 on his file. That case was instituted by the complainant against the petitioner and two others under sections 466 and 474, Indian Penal Code, and the question which arose was whether cognizance of the offences complained of could be taken without the sanction of the Local Government under section 197, Criminal Procedure Code. The subject-matter of the complaint was a record of a civil suit in which the complainant figured as a defendant and which purported to have been tried and decreed by the petitioner under the Village Courts Act (I of 1889). The complaint alleged that the whole proceeding from start to finish was fictitious, and that the entire record was a forgery. The point for decision is whether sanction under section 197, Criminal Procedure Code, is necessary before a Court can take cognizance of an alleged offence of this character.

Section 197 provides (to extract so much of it as is relevant here) that

"when any person who is a Judge within the meaning of section 19 of the Indian Penal Code is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government."

It is not disputed that a Village Munsif, when he tries suits under the Village Courts Act, is a Judge. But it is contended that the alleged offence was not "committed by him while acting or purporting to act in the discharge of his official duty".

The passage just quoted represents the latest of several legislative endeavours to define the kind of offences in respect of which sanction is required. In the 1872 Code (section 466) the phrase was "an offence committed by a public servant in his capacity as such public servant" ; and in the Codes of 1882 and 1888 "is accused as such judge or public servant of any offence". But though the present wording is perhaps

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more explicit, there is no reason to suppose that it marks any change in the intention or the principle underlying the provision. The cases which have been decided under the successive Codes show that much difficulty has been experienced in discovering any general tests by the application of which it may be found whether sanction is or is not necessary. Before examining those cases, one fairly obvious fallacy, commonly urged and indeed to some extent countenanced by the words of the section, may be disposed of. It is said, to take an example, that a Judge who fabricates a record is not "acting or purporting to act in the discharge of his official duty," because it is no part of his official duty to commit such an act. But it is evident that no act can be at once part of his official duty and an offence, so that, were this construction accepted, the provision would involve a contradiction in terms. Clearly what is meant is that the offence must be committed in dereliction of the duty cast upon him as a Judge.

Not all such derelictions, however, it has been held, fall within the scope of the section. *In re Gulam Muhammad Sharif-ud-daulah*[1] Parker, J., held, under section 197 of the Code of 1882, that sanction was required to prosecute a Judge who used defamatory language during the trial of a suit, because he was accused of uttering it "as a Judge". But in dealing with similar circumstances, a Calcutta Bench in *Nando Lal Basak* v. *Mitter*[2] differed from this view, adopting the opinion of Field, J., expressed in an earlier unreported case that the corresponding provision in the Code of 1872

> "was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which being a public servant is a necessary element in the offence."

This view was approved and acted upon by Davies and Moore, JJ., in *The Municipal Commissioners for the City of Madras* v. *Major Bell*[3] by Coutts Trotter, J. (as he then was) in *Sheik Abdul Kadir Saheb* v. *Emperor*[4] and by Jackson, J., in *Raja Rao* v. *Ramaswami*.[5] Difficulty, however, often arises in applying this principle, in deciding, that is, whether the alleged offence contains an element necessarily dependent upon the offender being a public servant. It is not enough that the offence should be imputed to a public servant acting in the discharge of his official duties if the nature of the offence, *e.g.*, the

1. (1886) I.L.R. 9 Mad. 439.
2. (1899) I.L.R. 26 C. 852.
3. (1901) I.L.R. 25 M. 15.
4. (1916) 1 M.W.N. 384.
5. (1927) I.L.R. 50 M. 754: 52 M.L.J. 647.

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use of defamatory language is such that, so far as its ingredients go, any one else might have committed it. This was the view taken by Coutts Trotter, J., in the case cited above with regard to the offence of criminal breach of trust by a public servant. Although the money came into the public servant's hands in his capacity as a public servant, yet he committed in respect of it an offence such as another, not a public servant, might have committed, but the learned Judge, in holding that section 197 would not apply, confessed that it was a question of considerable difficulty and very near the line.

Coming now to the cases which relate to the fabrication of records, an early Bombay decision *Imperatrix* v. *Lakshman Sakharam, Vaman, Hari and Balaji Krishna*[6] under the Code of 1872 was upon facts closely similar to the present instance. A *Mahalkari,* who was an officer, invested with the powers of a Judge in a certain class of cases, had fabricated the entire record of a civil suit The language of section 466 of the 1872 Code, as I have noted above, differed from that of our present section 197, but its intended scope was probably the same. The learned Judges held that that scope extended

> "to all acts ostensibly done by a public servant, *i.e.*, to acts which would have no special signification except as acts done by a public servant . . . The very object of the fabrication would be to invest those proceedings with a special character, and it is, we think, proper that the alleged fabricator should be dealt with in his official capacity under the provisions specially enacted, although private individuals charged with the same acts or omissions, or acts in one sense the same, would be proceeded against in the ordinary way"

This passage brings out, I think, very clearly the nature of the issue which these fabrication cases raise. "Any one," it is urged, "might equally well have committed the forgeries." The answer is "No, no one but the public servant himself could have produced them in the very hand in which, if genuine, they would have been written."

Miller, J., in *Palaniandi Pillai* v. *Arunachellam Pillai*[7] had to deal with a case where a Village Magistrate was accused of making a false record in his register convicting the complainant of theft of pumpkins. He found that inasmuch as the karnam, and not the Village Magistrate, has to maintain the register, the latter was not acting "as a Judge," in doing what he did. I think it is clear that this finding was enough to exclude the application of section 197, Criminal Procedure Code.

6. (1877) I.L.R. 2 B. 481. 7. (1908) I.L.R. 32 M. 255.

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The learned Judge took occasion, however, to consider *Imperatrix* v. *Lakshman Sakharam, Vaman, Hari and Balaji Krishna*[6] and observed, in criticism of the passage from it which I have quoted,

"Any one could have done it who had access to the register kept by the karnam or the Village Magistrate and though the effect of it would be to give the impression that the Village Magistrate in a certain case had acted as Judge, he would not, if the charge is true, have in fact done so."

I have already ventured to suggest the answer to this line of reasoning, and would add the objection, with all respect, that the same contention would apply even to a forged interpolation in a genuine record, thereby carrying the application of the argument to greater lengths than it has been taken before me, and excluding from the scope of section 197, Criminal Procedure Code, such an offence, for example, by a public servant as that rendered punishable by section 167, Indian Penal Code (framing an incorrect document with intent to cause injury). Miller, J., adds:

"I do not see how a Magistrate who fabricates a record in which he figures as Judge can properly be said to be acting as Judge when he does so."

The correctness of this latter observation was doubted by Spencer and Krishnan, JJ., in *Subbiah Pillai* v. *Emperor*,[8] a case distinguishable, however, on the ground that the fabrication (of a judgment and a calendar) was in a real case actually pending before the Village Magistrate. While feeling no doubt that, in these circumstances, the Village Magistrate was acting not in a private capacity but as a Judge, so that section 197 would apply, they had not to decide whether, if the proceedings were wholly fictitious, the same conclusions should be drawn. Lastly I may notice two unreported cases. In Criminal Revision Case No. 310 of 1925, Wallace, J., held that a Sub-Registrar who tampers with a document presented to him for registration is not protected by the section. Any one who got access to the document was equally well situated to do the same. In the other case, Criminal Revision Case No. 291 of 1916, a Village Munsif before whom some suits were pending had attached a jutka and pony before judgment, and a complaint was filed against him under sections 379 and 114, Indian Penal Code. Seshagiri Aiyar, J., who disposed of the Revision Petition, rejected the contention that as the Village Munsif was acting *ultra vires* he was not acting as a Judge within the meaning of the section.

6. (1877) I.L.R. 2 B. 481.

8 (1920) M.W.N. 7.

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"If this argument is pushed to its logical conclusion," he observes, "no public servant or Judge can have the safeguard of a sanction, as it is not within the powers conferred upon such an officer to commit an offence"

He adds that

"in all cases where a public servant purports to exercise his functions as such, he must be deemed to be acting as such public servant"

and that accordingly sanction was necessary.

Thus it will be seen that there is good authority for the position that where a Judge, in a pending case, fabricates any record or dishonestly exceeds his powers, the offence is "committed by him while acting or purporting to act in the discharge of his official duty." Mr. Jayarama Aiyar, conceding this, contends that the fabrication of an entire record does not involve such an offence—that in the absence of any pending case it cannot be said that the alleged offender was discharging or purporting to discharge his official functions. The best answer which I can make is that if in forging a judgment and a calendar in the one case, and in unauthorisedly issuing an attachment warrant in the other, a Judge is purporting to discharge his duty, he is no less doing so in writing up the record of an imaginary suit. The difference is a difference of degree and not of kind. The essence of the offence in each case is that an officer having as part of his official duty the correct maintenance of judicial records fraudulently falsifies them. The purport of that forgery was that, acting in the discharge of his duty, he had entertained and decided a civil suit, and it can make no difference, for the present purpose, whether the record was wholly false or partly true and partly false, and so whether the suit was wholly fictitious or fictitious only in part. In either case, so far as the fictitious part was concerned, he was as much or as little "purporting to act in the discharge of his official duty" in inventing the record of it. Nor do I feel hesitation in deciding that an essential ingredient of the act complained of was that the author was a public servant. I have already found occasion to remark upon this aspect of the matter. It does not seem even to have been argued in *Subbiah Pillai* v. *Emperor*[5] and it has received an affirmative answer in *Imperatrix* v. *Lakshman Sakharam, Vaman, Hari and Balaji Krishna.*[6] Jackson, J., in *Raja Rao* v. *Ramaswami*[8] finds some difficulty in following this latter decision, observing:

5 (1927) I.L.R. 50 M 754· 52 M.L.J. 647
6. (1877) I.L.R. 2 B. 481.
8 (1920) M.W.N. 7.

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"If the ingenious man had forged the record as coming before some other Court, there presumably would be no question of sanction, and why must there be sanction because he selected his own Court?"

This is really Miller, J.'s argument in another shape, and my own view is that it makes all the difference that the Court and the records are those for which the Judge as a Judge is responsible.

I accordingly allow the Revision Petition, set aside the order of the Stationary Sub-Magistrate, and direct that the complaint as against the petitioner be dismissed for want of sanction under section 197, Criminal Procedure Code.

N.S. *Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

A. M. Appavoo Chettiar .. *Petitioner** (*Plff.*)

v.

The South Indian Railway Company represented by its Agent at Trichinopoly and another .. *Respondents* (*Defts.*).

Appavoo Chettiar v. The South Indian Railway Company.

Limitation Act (IX of 1908), Art 96—Contract Act, S 72—Mistake of law—When a ground for relief

Mistake of law can be a ground for relief only if it is of such a kind that it is mixed up with certain specific facts relating to the particular individual so much so that it may be said that, as the combined effect of the party's view of the law and the facts, he made a mistake at the time of entering into the transaction as to the nature of pre-existing private rights. Where the mistake of law is a mistake as to the general law in British India—a law which is applicable to the party exactly in the same way as to all other citizens in British India, it is not a ground for relief.

Cases on the subject reviewed

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree, dated 30th January, 1926 of the Court of the Subordinate Judge of Negapatam in S.C.S. No. 841 of 1924.

R. Srinivasa Aiyangar for petitioner.

The Advocate-General (*T. R. Venkatarama Sastriar*) and *S. S. Ramachandra Aiyar* for respondents.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J.—The points arising for decision in this case are substantially the same as those arising in C.R.P. No. 1259 of

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*C.R.P. No. 535 of 1926 14th February, 1928.

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1925 decided by us on the 29th November last. In that case the Government was not represented, but now we have had the advantage of hearing the learned Advocate-General who appeared for Government. In the former case we relied on *Cooper* v. *Phibbs*[1] and the observations of Stirling, J., in *Allcard* v. *Walker*.[2] No issue was raised in that case as to whether the payment was voluntary. On that ground we refused to consider the two decisions in *Slater* v. *Mayor, etc. of Burnley*[3] and *William Whiteley, Ltd.* v. *The King*.[4] In those cases the ground of the decision was that the payments were voluntary and we therefore held there was no need to consider those decisons at length; but, towards the end of the judgment, there is an observation that even if it is necessary to consider them, we do not prefer to follow them. This observation is, of course, *obiter*. But in the present case the point has to be considered and we have had the advantage of the argument of the Advocate-General on this point and on the application of *Cooper* v. *Phibbs*[1] Mr. R. Srinivasa Aiyangar, the learned vakil who appeared for the petitioner, relied on section 72 of the Contract Act and on the change in the language of Art. 96 of the Limitation Act of 1908. We may at once observe that there can be no case of coercion in this case, for it is not suggested that the goods were demanded by the consignee on the offer of a smaller amount than what was demanded and that the company's agent refused to deliver them. On the other hand, the plea of mistake shows that the petitioner himself was not aware of the true situation at the time of the delivery of the goods, and could not have made such an offer; or, in other words, the case of mistake would be inconsistent with the case of coercion. This is in fact conceded by Mr. Srinivasa Aiyangar. The only question is whether there is such a mistake as would afford relief to the petitioner. On account of the change of language in Art. 96 of the Limitation Act, it may be conceded that some kind of mistake of law may be a ground for relief. What exactly is the mistake of law that may be a ground for relief is really the point to be considered in the case. If the mistake of law is of such a kind that it is mixed up with certain specific facts relating to a particular individual so much so that it may be said that as the combined effect of a party's view of the law and the facts, he made a mistake at the time of entering into the transaction as to the nature of his pre-existing

1. (1867) L.R. 2 H L. 149 at 170.
2 (1896) L.R. 2 Ch. 369
3. (1888) 59 L.T. 636.
4 (1909) 101 L.T. 741.

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private right, it may be said that such a mistake is not a pure mistake of law and is covered by the language of Lord Westbury in *Cooper* v. *Phibbs*[1] which was quoted by Stirling, J., in *Allcard* v. *Walker.*[2] Some such limitation must be placed on the words of Lord Westbury which on their face seem to be too wide and which if literally applied will cover cases of all mistakes of law, for every mistake of law committed by a party and made the basis or ground of relief must ultimately lead to some mistake as to his right; and in that sense, all mistakes of law are mistakes affecting private rights; but in this sense, there will never be a case to illustrate the proposition that a mistake of law cannot be a ground for relief. In the present case the mistake of law is a mistake as to the general law in British India—a law which is applicable to the petitioner exactly in the same way as to all other citizens in British India. There is no fact peculiar to the plaintiff, nor can it be said that, at the time of the consignment of goods, there was any special or private right peculiar to the plaintiff as distinguished from any other citizen. The right of the plaintiff is a general right, that is, a right which he possesses in common with every other citizen in British India, to consign goods through the Railway Company on payment of particular surcharge. A right of that kind could not have been intended by Lord Westbury in his observations in *Cooper* v. *Phibbs,*[1] illustrations of which are afforded by the decisions in *Earl Beauchamp* v. *Winn*[5] and in *Ram Chandra Misra* v. *Ganesh Chandra Gangopadhya*[6] as being cases of mistake as to private rights. The same conclusion seems to emerge on a consideration of the sections of the Contract Act. Though the word "mistake" in section 72 is not limited, it must refer to the kind of mistake that can afford a ground for relief as laid down in sections 20 and 21 of the Act. Section 21 says that a mistake as to law of British India is not a ground for relief, which means that a mistake of law to be a ground of relief within the meaning of section 21 must be really a mutual mistake relating to the nature of the private right of a party with reference to special facts peculiar to him mixed up with a question of law. In this case it is therefore clear that the mistake of the petitioner is a pure mistake of law and cannot be said to be a mistake bearing upon the private or the special right of the petitioner and therefore it cannot become a ground of relief within the meaning of section 72 of the Contract Act or Art. 96 of the Limitation

1. (1867) L.R. 2 H.L. 149 at 170.
2. (1896) L.R. 2 Ch 369
5. (1874) L.R. 6 H.L. 223.
6. (1916) 21 C.W.N. 404.

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Act. In *Allcard* v. *Walker*[2] Stirling, J., went on to observe at page 831:

"It is not accurate to say that relief can never be given in respect of a mistake of law."

He then referred to the statement of Turner, L.J., in *Stone* v. *Godfrey*,[7] which was recognised by the Court of Appeal in *Rogers* v. *Ingham*[8]; but the weight of these observations seems to be very much shaken by the observation of the Court of Appeal in *Holt* v. *Markham*.[9]

The observations of Scrutton, L.J., particularly are useful. He refers to the observations of Lord Sumner in *Baylis* v. *Bishop of London*[10] and in *Sinclair* v. *Brougham*[11] where it is said:

"There is now no ground left for suggesting as a recognizable 'equity' the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer."

It is unnecessary to pursue this ground of the plaintiff's action with reference to English cases as the Indian Law seems to be clear, namely, that a mistake, in the sense that it is a pure mistake as to law in India, resulting in the payment by one person to another and making it inequitable that the payee should retain the money is no ground for relief. That being so, the plaintiff will not be entitled to recover.

It is really unnecessary to consider the question whether the payment can be said to be voluntary, for the distinction whether in a particular case the mistake is one of mistake of pure law or the payment is voluntary becomes really academic. We may, however, observe, that though it might be possible to distinguish the decision in *William Whiteley, Ltd.* v. *The King*[4] it is impossible to distinguish the case in *Slater* v. *Mayor, etc. of Burnley*.[3] Anyhow it is clear that the plaintiff is not entitled to recover. To this extent, we depart from the view taken in C.R.P. No. 1259 of 1925.

In the course of the argument our attention has been invited by the learned Advocate-General to a circular letter issued by the Government of India (Ex. D) which shows that they did not mean to exempt cotton seeds under the Act of 1921 and that if any Local Government or administration considers it necessary for special reasons to extend the concession to any other varieties of fodder such as oil cake or cotton seed, the

2. (1896) L.R. 2 Ch. 369. 3 (1888) 59 L.T. 636
4. (1909) 101 L.T. 741. 7. (1854) 5 De G. M & G 76 at 90.
8. (1876) L.R. 3 Ch. D 351 at 357. 9. (1923) 1 K.B. 504.
10. (1913) 1 Ch. 127. 11. (1914) A.C. 398.

previous sanction of the Government of India should be obtained. For the respondent our attention has been drawn to a letter issued by the Government of India under which they direct refund of amounts like those claimed in this case. Neither of these is relevant for the decision of this case when the matter goes before a Court of Law. The learned Advocate-General referred to items in the Tariff Act of 1921 relating to grains and pulses, seeds and fodder; but, after giving our best attention to this case, we are not able to depart from the view already taken by us and by Waller, J., namely, that cotton seeds are fodder within the meaning of the Act.

The result is that the Civil Revision Petition fails; but, having regard to the circumstances of the case and particularly the fact of the Government circular directing refund of such amount, we make no order as to costs in the Civil Revision Petition.

N.S. *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Chaturvedula Suryanarayana .. *Petitioner* (6th Deft.)*

v.

Sree Raja Venkata Ramayya Appa Rao Bahadur, Zamindar .. *Respondent (Plff.).*

Civil Procedure Code (V of 1908), S. 115—Erroneous decision—Interference with—Jurisdiction—Decision calculated to perpetuate error and to cause multiplicity not for one year only but for all time—Effect—Kattubadi—Arrears of—Interest on—Rate of, to be allowed—Kattubadi payable in respect of agraharam to Zamindar—Purchaser of definite extent from one of agraharamdars—Liability of—Limit of.

The purchaser of a definite extent from one of the agraharamdars, who are liable to pay kattubadi to the Zamindar, is not liable for the entire kattubadi jointly and severally with the owners of the remaining portions of the agraharam. The purchaser's liability rests only on the privity of estate and is limited to the proportionate share due on the portion he purchased.

Where the Courts below passed a decree making the purchaser liable for the kattubadi sued for jointly and severally with the owners of the other portions without the barest reference to the principles on which alone the case could be decided, *held*, that they acted with material irregularity, and that the High Court would be justified in interfering with their decision in revision.

Where the result of an erroneous decision is to perpetuate the error and to cause multiplicity not for one year but for all time, the High Court would be justified in interfering in revision

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*C.R.P. No. 1160 of 1927. 7th August, 1928.

Surya-narayana v. Sree Raja Venkata Ramayya Appa Rao Bahadur.

The policy now is to give interest only at 6 per cent. on all arrears of rent. Kattubadi is in the nature of rent, and interest only at 6 per cent ought to be allowed on arrears of kattubadi.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the decree of the Court of the Subordinate Judge of Bezwada in Appeal Suit No. 40 of 1926 preferred against the decree of the Court of the District Munsif of Nuzvid at Bezwada in Original Suit No. 98 of 1925.

V. Pattabhirama Sastri for petitioner.

T. Ramachandra Rao for respondent.

The Court delivered the following

JUDGMENT.—The facts of the suit out of which the present Civil Revision Petition arose may be stated as follows: The plaintiff is one of the Zamindars of Nuzvid. The defendants are the owners of an agraharam in the Zemindari, liable to pay kattubadi to him. Defendants 1 to 4 are the descendants of the original agraharamdars. 5th defendant purchased the 1st defendant's share in the agraharam. 6th defendant purchased 100 acres 15 cents out of the 5th defendant's share. The suit is to recover Rs. 309-10-5 being the amount due on account of kattubadi from the defendants for faslis 1332 and 1333. The Lower Courts gave a decree to the plaintiff as prayed for. 6th defendant is the petitioner before me. He originally filed a second appeal. It was afterwards converted into a Civil Revision Petition.

His contention is that he being only a purchaser of a definite extent from one of the agraharamdars is not liable jointly and severally with the other defendants and that his liability now rests only on the privity of estate and must be limited to the proportionate share due on the portion he purchased. This contention is undoubtedly correct. *See* judgment of myself and Reilly, J., in *Mosafkanni Ravuthar* v. *Doraisami.*[1] It is true that this decision was not reported in the Reports by the time the two Lower Courts heard the case. But there was a decision in *Venkatasubramaniyam* v. *Raja of Venkatagiri,*[2] in which the principles were stated to some extent, though it was not an actual decision on the point, and the matter was further cleared up in the decision of myself and Reilly, J. In the District Munsif's judgment after stating the facts and referring to an earlier judgment of the year 1919, Ex. A, he says: "I find on both the issues 1 and 2 for the plaintiff." Ex. A

1. (1926) 54 M.L.J. 30. 2. (1919) 11 L.W. 523.

cannot help the decision of this case as there were no purchasers at that time and the 6th defendant was not a party to it. He has not practically touched the point raised by the 6th defendant and there is neither discussion nor decision on it.

On appeal to the Subordinate Judge, beyond saying that a contrary view will entail serious consequences and there is no reason why the Zamindar should be put to inconvenience, there is no reference to the legal principles bearing on the matter or to the decisions. The result is that the decisions of the Lower Courts are not only erroneous but not satisfactory.

The only question that now arises before me is whether I should interfere in Civil Revision Petition under section 115. If it is merely a case of erroneous judgment on an isolated matter without further far-reaching consequences, I would certainly not interfere in revision however erroneous the decision may be, though I am rather inclined to think that the decision is perverse within the meaning of the decision of the Full Bench in *Kristamma Naidu* v. *Chapa Naidu*.[3] But leaving aside this aspect, I have to observe that the decision has got far-reaching consequences which require my interference in revision. The first effect of a joint decree is to necessitate suits for contribution amongst the agraharamdars which would have been unnecessary if the suit is correctly decided. If the suits for contribution are the result of a correct decision of the case, one cannot complain of the situation on the ground of the multiplicity of the suits and there is no justification for any attempt to avoid the multiplicity. But where, as in a case like this, multiplicity is the result of a wrong decision, it is the duty of a superior superintending Court to avoid such multiplicity by setting the wrong decision right. In the present case if the decision is not now interfered with, the matter will be *res judicata* for succeeding years and there will be multiplicity of suits for contribution in all succeeding years and this state of things is bound to go on for all time. If such a state of things is not stopped by a superior superintending Court, the power of superintendence exists in vain. A number of cases have been cited before me by the learned vakil for the petitioner. Two of these relate to Court-fees and I do not wish to rely on them. The decision in *Gangayya* v. *Venkataramayya*[4] is a case where the High Court interfered with the decision of the Lower Court acting on an erroneous view of the law and resulting in a

3. (1894) I.L.R. 17 M. 410 (F.B.). 4. (1922) 44 M.L.J. 80.

Suryanarayana v. Sree Raja Venkata Ramayya Appa Rao. Bahadur.

grossly illegal situation. They relied on the Full Bench decision in *Sundaram* v. *Mausa Mavuthar.*[5] In *Gopayya* v. *Sobhanadri*[6] Jackson, J., interfered in revision in a case in which the Lower Courts made no enquiry into the facts. In the present case the Lower Courts made no reference to the legal principles underlying the matter in controversy. In *Umed Mal* v. *Chand Mal*[7] the Privy Council affirmed the judgment of the Chief Commissioner in revision where he held that the decision of the suit by the Lower Court in the absence of the mortgagor was a material irregularity. I think in the present case the Courts below acted with material irregularity when they proceeded to act without the barest reference to the principles on which alone the case can be decided. See also *M. & S. M. Ry.* v. *Gangammal,*[8] where Madhavan Nair, J., interfered in a similar case. The decision in *Brindaban Chander Choubey* v. *Gour Chandra Ray*[9] also shows that where the result of an erroneous decision is to perpetuate the error and to cause multiplicity not for one year but for all time, the High Court would be properly acting in its powers of superintendence and would rightly interfere in such a case under the Government of India Act. The respondent does not lose any portion of his decree but continues to get a decree for the same amount. Only the defendants will not be jointly and severally liable. For all these reasons I resolve to interfere with the decisions of the Lower Courts and modify the decrees of the Courts below by limiting the liability of the 6th defendant to Rs. 11-13-0 per year or Rs. 23-10-0 for both years. The plaintiff will get proportionate costs on the amount decreed and will pay proportionate costs on the amount disallowed in the Court of First Instance so far as the 6th defendant is concerned and in the High Court and in the Lower Appellate Court each party will bear his or their own costs.

Another point has been touched before me in revision. The Courts below have given interest on the amount decreed at 12 per cent. per annum. I do not think this is right. The policy now is to give interest only at 6 per cent. on all arrears of rent and kattubadi is in the nature of rent. But, however, I do not wish to interfere with this point in revision especially as the amount of interest due by the 6th defendant is very small. The decree of the Lower Court is modified accordingly.

A.S.V. *Decree modified.*

5 (1921) I.L.R. 44 M. 554 40 M.L J. 497 (F B)
6. (1926) 24 L.W. 839.
7. (1926) 52 M.L.J. 368 (P.C).
8. A.I.R. 1928 M. 484,
9. (1919) 56 I.C. 155.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY.

Munshi Abdul Wahab Saheb and another .. *Petitioners* in both (Accused 1 and 2).*

Munshi Abdul Wahab Saheb, *In re.*

Madras Canals and Public Ferries Act (II of 1890), Ss. 3, 4, 8 and 9—Power of Government to regulate navigation up and down the river—Extent of—Limits of ferry—Power to declare both sides of a river for distance of twelve miles—Setting out limits by mentioning five places at a total distance of twelve miles—Intention of Government—Five ferries and not a single ferry—Voyage of steam launch conveying passengers from one place to the other places—If can be described to be across the river.

Without a notification under S. 4 of the Act, the Government has no power to regulate navigation up and down the river.

The power given to the Government by S 8 of the Madras Canals and Public Ferries Act to define the limits of a ferry which is, by the definition in S. 3, a place, cannot by any reasonable stretch of language be interpreted so as to enable the Government to include in the place concerned both sides of a river for a distance of twelve miles.

Where the Government, by its notification under S 8 of the Act declaring the ferry, set out its limits by mentioning five places the upmost of which was twelve miles distant from, and on the opposite bank of, the downmost, and did not mention the place on the opposite bank corresponding to each of these five places,

Held, that the intention of the Government must not be taken to be to declare the whole of both the banks of the river for the distance of twelve miles as a single ferry and prevent the navigation up and down the river to that entire distance, but to declare five different ferries at the five places, as otherwise the notification would be *ultra vires* of its powers

Held also that the voyage of a steam launch conveying passengers from one of the places declared as a ferry up the river to the other places declared as ferries cannot be described to be "across the river" as mentioned in S. 9 of the Act.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of West Godavari Division at Ellore, dated 24th September, 1927 in Cr. Appeals Nos. 43 and 38 of 1927 preferred against the judgment of the Court of the Joint and 1st Class Magistrates of Narsapur, dated 19th July, 1927 and 8th January, 1927 in C.C. Nos. 93 and 79 of 1926 respectively.

C. Sidney Smith, Miss S. V. Devadoss and *P. Somasundaram* for petitioners.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The two petitioners have been convicted of working a ferry in contravention of section 9 of the Canals and Public

*Cr.R.C. Nos. 65 and 66 of 1928. (Cr.R.P. Nos. 34 and 35 of 1928). 22nd August, 1928.

Munshi Abdul Wahab Saheb, *In re.*

Ferries Act, 1890, and their convictions have been upheld on appeal by the Sessions Judge of West Godavari. The case against the petitioners is that on 20th November, 1926 they carried passengers on the steam launch "Moulana" across a channel, that is, the Vasistha Godavari River, within the notified limits of a ferry declared by the Government under section 8 of the Act to be subject to the provisions of the Act. Ex. A, dated 30th December, 1895, has been produced as the notification of the Government, declaring the ferry under the name of the "The Narsapur Steam Ferry" to be subject to the provisions of the Act and purporting to fix its limits. It is argued for the petitioners (1) that this notification of the Government was *ultra vires*, and (2) that the petitioners did not work a ferry within the meaning of section 18 of the Act.

The Act is not very easy to understand in some respects. In section 3 a ferry is defined as "a place at which goods, animals or passengers are conveyed across a channel by means of vessels." That is a curious definition and not in accordance with the meaning of a ferry in English Law. And it is almost impossible to reconcile with section 9 of the Act, which speaks of "rights of ferry." But we must take the definition as it stands. It was open to the Government under section 8 of the Act to declare the place called "The Narsapur Steam Ferry," at which goods, etc., were conveyed across the river, to be subject to the provisions of the Act and that is what they must be supposed to have intended to do by the notification, Ex. A. The limits of that place they were also entitled to define under that section. But the limits set out in Ex. A are very surprising. They are shown in the notification as "(1) Narsapur, (2) Sakinetipalli, (3) Appanaramunilanka, (4) Chinchinada, and (5) Razole." It is admitted that Razole, which is on the left bank of the river, is 12 miles from Narsapur, which is below it on the right bank, and that the other places named are between them, Sakinetipalli and Appanaramunilanka being on the left bank and Chinchinada on the right bank. If the places named are intended to indicate the limits of one ferry, then the upstream limit must be Razole and the downstream limit Narsapur. In that case there is no point in mentioning the intermediate places at all. It would, however, be extraordinary to define the limits of a place where goods, etc., are conveyed across the river so as to include a length of 12 miles on each side of the river. The learned Sessions Judge appears to take the view that the notification defines the ferry as from place

No. 1 (Narsapur) to place No. 2 (Sakinetipalli), from place No. 2 to place No. 3 and so on. That would be in effect to declare four successive ferries, two of which would extend four miles up the river besides crossing it. Apart from the difficulty of fitting such a ferry into the definition of a ferry in the Act there appear to be two strong reasons against accepting this interpretation of the notification. Firstly, it is almost impossible to imagine why, if the Government intended to declare a ferry from place No. 1 to place No. 2, another ferry from place No. 2 to place No. 3 and so on, that was not clearly stated in the notification. It is incredible that the Government should go out of their way to make a notification to the public regarding a simple matter unnecessarily obscure or mystifying. Secondly, the succession of places named cannot indicate a succession of ferries between those places, as place No. 2 and place No. 3 are on the same side of the river and under the Act there can be no ferry between two places on the same side of the river. Mr. Ganapathi for the Public Prosecutor has urged that under section 13 of the General Clauses Act "place" in the definition must be understood as including places. I do not think that the principle of that section can be applied to the definition in that way. But the suggestion perhaps indicates the way in which the notification should be read as declaring not a single ferry but a group of five ferries, the five places named being mentioned as "limits" to show where the five crossings of the river are. If the notification is to be read as specifying five places at which goods, etc., are to be conveyed across the river subject to the provisions of the Act, it becomes intelligible though not very explicit, and there is meaning in mentioning the three intervening places. If the proper construction of the notification is that the conveyance of goods, etc., across the river at Narsapur, at Sakinetipalli, at Appanaramunilanka, at Chinchinada and at Razole is to be subject to the provisions of the Act, it is not *ultra vires*. For practical purposes it may be inconvenient that the places respectively opposite to the places named are not specified. But the notification would not be *ultra vires* merely because the Government had not chosen to define those opposite places; the result would merely be that any place approximately opposite to any of the named places could be regarded as the other end of that particular crossing. In effect the Government would have notified five ferries instead of one. If it were permissible to interpret the notification, Ex. A, by the view which the Government themselves took of it nine years later, it

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would be useful to notice that the notification Ex. C, dated 1st November, 1905, shows that they were then under the impression that there were five ferries, one at each of the places named.

But the contention put forward for the prosecution in this case is that by the notification Ex. A, the whole river from Razole to Narsapur, 12 miles below has been declared to be a ferry subject to the provisions of the Act with the result that no person not "duly authorized" may convey goods, animals or passengers across the river at any point in that stretch of 12 miles. I do not think that the power given by section 8 of the Act to define the limits of a ferry—which, it must be remembered, is by the definition "a place"—could by any reasonable stretch of language be interpreted so as to enable the Government to include in the place concerned both sides of the river for a distance of 12 miles. It must be remembered that the Act gives to the Government powers very seriously to restrict the liberty of the subject and those powers must be strictly construed. But the prosecution goes, and has to go for the purpose of the case, much further than this. It is contended that the notification Ex. A not only makes it unlawful for any one not "duly authorised" to convey goods, animals or passengers across the river at any point between Razole and Narsapur, but also makes it unlawful for any one not so authorised to convey goods, animals or passengers up or down the river between Razole and Narsapur. There is nothing in the Act, so far as it deals with ferries, to enable the Government so to restrict the right of navigation along the river. Under section 4 of the Act the Government may declare the river to be a canal subject to the provisions of the Act and may then under section 5 require all vessels using the river to be licensed or registered. But it has been stated before me that no notification under section 4 has been issued in respect of this part of the river. Without a notification under section 4 the Act gives the Government no power to regulate navigation up and down the river; and the prevention of navigation up and down the river is wholly outside the scope of the Act. It has been suggested in the course of the arguments that, because Razole is on one side of the river and Narsapur, which is reached after going 12 miles down the river and round two semi-circular bends is on the other side, the voyage from Razole to Narsapur can be regarded as one across the river. That argument carries its refutation on its face. To suggest that such a voyage is one "across" the river is an abuse of language.

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There is nothing unreasonable or *ultra vires* in the notification Ex. A, if it is interpreted, as I think it must be interpreted—and as the Government themselves later on interpreted it—as declaring a series of five ferries across the river at the five places named. So interpreted the notification is entirely within the language and scope of the Act. It is not very easy to reconcile the schedule of tolls attached to the notification with that interpretation. But, as the notification purports to have been issued under section 8 of the Act, I think we are bound to interpret it, so far as possible, in consonance with that section and, if there is anything in the schedule which suggests an interpretation not in consonance with the section, to ignore that for the purpose of interpretation. If it had been the intention of the Government by that notification to declare the whole of both banks of the river for the distance of 12 miles from Razole to Narsapur a place at which goods, animals and passengers are conveyed across the river, and still more if it had been their intention, as is contended, to prevent navigation up and down the river between Razole and Narsapur, then in my opinion the notification would have been clearly *ultra vires*.

This brings me to the second contention of the petitioners. What has been found is that the launch "Moulana," owned by petitioner 1 and managed by petitioner 2, on 20th November, 1926, conveyed passengers (on payment of passage money, I understand, though that does not appear in the records before me) from Narsapur to Razole, calling at Sakinetipalli, Appanaramunilanka and Chinchinada on the way. That it is alleged was, "working a ferry" in contravention of section 9 of the Act. What section 9 makes unlawful is conveying goods, animals or passengers, across a channel within the defined limits of a ferry declared under section 8. The voyage of the "Moulana" on 20th November, 1926 cannot by any reasonable use of language be described as across a channel (the river is a channel for the purpose of the Act). It was a voyage up the river such as the Government has no power under the Act—and I presume no wish—to prohibit. The charge of working a ferry in contravention of section 9 is clearly not made out.

The convictions and sentences are set aside, and the petitioners are acquitted. The fines, if paid, will be refunded.

Cr.R.C. No. 66 *of* 1928.—This is a case similar to Criminal Revision Case No. 65 of 1928. The convictions and sentences

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are set aside and the petitioners are acquitted. The fines, if paid, will be refunded.

N.S. *Revision Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—VISCOUNT DUNEDIN, LORD SHAW, LORD BLANESBURGH AND SIR JOHN WALLIS.

Messrs. Juggi Lal-Kamalapat of Cawnpore and others .. *Appellants** (*Defts.*)

v.

The Swadeshi Mills Company, Limited, of Bombay .. *Respondents* (*Plffs.*).

P. C.

Messrs. Juggi Lal-Kamalapat of Cawnpore *v.* The Swadeshi Mills Co., Ltd., of Bombay.

Trademark—Infringement of—Deception by sound as well as by sight—Possibility of—Passing-off action—Damages in—Measure of.

In a passing-off action, *held,* that there might be deception by sound as well as by sight.

The plaintiffs were a milling company who dealt largely in Indian cloths, and who, in connection with the sale of that Indian cloth, used certain trademarks. In several of those trademarks, either in conjunction or alone, the lotus flower was the leading figure. They instituted a passing-off action against the defendants, also manufacturers of cotton piecegoods, complaining that, by using a trademark bearing a lotus device, they were able successfully to palm off their goods as those manufactured by the plaintiffs

Held, that there was no cut and dried rule which could be laid down by a Court of Law for the estimation of damages in such a case, and that a fair test to work on would be to take the figures which showed the falling-off in the plaintiffs' trade which came in after the pirated mark was introduced on the market by the defendants, and to add something thereto for a possible increase of trade.

Appeal No. 116 of 1927 from a decree of the High Court of Judicature at Allahabad (Mears, C.J. and Mukerji, J.), dated the 7th June, 1926, in a suit which the respondents (as plaintiffs) brought against the appellants in the Court of the Subordinate Judge of Cawnpore and which the High Court at the request of both parties transferred for hearing to its Extraordinary Original Jurisdiction.

The main questions for determination on the appeal were: (1) whether the High Court was right in finding that the defendants had infringed the trademarks of the plaintiffs and had passed off their goods as those of the plaintiffs, and (2) whether the High Court was right in awarding the sum of Rs. 1,72,800 to the plaintiffs as damages.

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*P.C. Appeal No. 116 of 1927. 2nd November, 1928

P. C.
Messrs. Juggi Lal-Kamalapat of Cawnpore
v
The Swadeshi Mills Co., Ltd., of Bombay.

The material facts of the case are fully set out in the judgment of the High Court reported in I.L.R. 49 All. 92.

Sir D. M. Kerly, K.C., Sir Geo. R. Lowndes, K.C., W. Wallach and *F. E. Bray* for appellants.

W. A. Greene, K.C., F. R. Archer, K.C. and *E. B. Raikes* for respondents.

Sir D. M. Kerly, K.C.—There are essential differences between the trade-marks of the defendants and those of the plaintiffs, and there is no such resemblance between them as to mislead anybody into purchasing defendants' cloth for that of the plaintiffs. No one could say that one mark could reasonably be mistaken for the other.

The method adopted by the High Court in assessing the damages is not in accordance with any principles of law and justice. In any event, as the plaintiffs claimed only Rs. 25,000 as damages in their plaint, the decree of the High Court awarding damages in excess of that amount is contrary to the provisions of the Civil Procedure Code.

[*Sir John Wallis.*—The plaintiff fixes a tentative figure in the plaint, and pays court-fee thereon, and should he recover more, he pays the extra court-fee: *see* O. 7, R. 2, Civil Procedure Code, 1908, and the Court Fees Act, section 11.]

W. A. Greene, K.C.—The judgment in *Leather Cloth Company* v. *Hirschfield*[1] relied on by the other side (on the question of damages) is clearly distinguishable.

[*Lord Blanesburgh.*—You put in the sum of Rs. 25,000 as the amount of damages in your plaint. Why should you get more, in the absence of evidence that there were damages in excess of that sum?]

Sir D. M. Kerly, in reply.—The plaintiffs in this case deliberately estimated the amount of damages at Rs. 25,000, and they should be tied down to that figure. They have not led any evidence on the question as to loss of profits, etc. The learned Judges of the High Court in awarding the plaintiffs the sum of Rs. 1,72,800 proceeded to estimate the amount of damages on their own view of what was just and proper. No evidence whatever was tendered by the plaintiffs as to the loss suffered by them. The damages awarded are purely speculative.

1. (1865) L.R. 1 Eq. Cas. 299.

P. C.

Messrs. Juggi Lal-Kamalapat of Cawnpore v. The Swadeshi Mills Co., Ltd., of Bombay.

Viscount Dunedin.

2nd Nov. 1928. Their Lordships' judgment was delivered by

VISCOUNT DUNEDIN.—This is a case of the class which is generally known as a passing-off action. The plaintiffs, who are the respondents before this Board, are a milling company who deal largely in Indian cloths, and who, in connection with the sale of that Indian cloth use certain trademarks. In several of those trademarks, either in conjunction or alone, the lotus flower is the leading feature. Now their complaint is that the defendants, who are appellants before this Board, suddenly began to use trademarks which, though if critically looked at by a person of such literacy as to have critical powers of observation would not be confused, yet would be apt to be confused by the illiterate and unobservant; and in particular did despite to them for this reason that their trademark had really got to be associated with the name of "Lotus," so that their cloth was known as "Lotus cloth," and that a person coming and asking for "Lotus cloth" might be satisfied by having cloth delivered with the trademark of the defendants. That there may be deception, as one might phrase it, by sound as well as by sight was nowhere more forcibly insisted on than in the well-known case of *R. Johnston & Co.* v. *Archibald Orr Ewing & Co.*[2]

The plaintiffs also claimed for an account of profits, but at the trial they gave up their claim for an account of profits and said that they wished instead to claim for damages.

The trial took place before the High Court at Allahabad in its Extraordinary Original Jurisdiction. That Court granted an injunction in respect of the trademarks and also it gave a large sum of damages, namely, Rs. 1,72,800.

Their Lordships have no doubt whatsoever that the judgment of the Court was perfectly right as regards the injunction; they think the evidence was quite satisfactory to show that the plaintiffs' cloth was associated with the name of "Lotus" and that any lotus device would lead to cloth being able to be palmed off as their cloth which was the cloth of another manufacturer. There was perhaps a little difficulty as to one of the emblems, where the emblem on the defendants' trademark, if looked at properly was not a lotus but a rose; but it was not only the question of the flower there; there was a garter-like enclosure

2. (1882) 7 App. Cas. 219.

P. C.

Messrs. Juggi Lal-Kamalapat of Cawnpore v. The Swadeshi Mills Co., Ltd., of Bombay.

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with a straight line beneath and the whole get-up of the one was so like the whole get-up of the other that their Lordships have no doubt that the Court below was right in making their injunction extend as it did.

When, however, their Lordships turn to the question of damages there is more difficulty. The plaintiffs came into Court with a demand only for Rs. 25,000 damages, or such other sum as the Court might think fit. It seems, according to Indian practice, that they would not be bound down to the figure of Rs. 25,000. When it came to the proof various figures were given and the figure on which the learned Judges below have proceeded was a figure which gave the sale account of the defendants' goods which had this, what may be called pirated mark upon them. The figure there brought out was, in round figures, Rs. 3,200,000. What the learned Judges then did was this. They said: "We will assume that of that Rs. 3,200,000 worth of goods the defendants would have sold 40 per cent if they had merely trusted to their own cloth without the addition of a misleading mark but 60 per cent. of it must be held to be due to the misleading mark"; and then, taking 60 per cent. of that Rs. 3,200,000, they calculated the figure of 9 per cent. of profit on that and by that calculation they brought out the sum for which they gave judgment.

Their Lordships think that it is far too speculative an assumption to say that you could divide this figure up into the 60 per cent. and 40 per cent., and they cannot think that there is a justification for a decree founded upon that calculation.

When it comes to the question of what figure is to be substituted the question is not so easy because the matter is very much in the dark. If it had been before a jury it would have been disposed of in the rough and ready way in which juries do dispose of such questions by giving a figure which, if not absolutely out of all question, would have stood the test of any review by a Court of Appeal.

Their Lordships cannot say that there is any cut and dried rule which can be laid down by a Court of law for the estimation of damages in a case like this, but think that on the figures given the safer figures on which to work are the figures which are given which show the falling-off in the respondents' trade which came in after this pirated mark was introduced on the market. If it is assumed that the whole of the falling-off was due to the use of the pirated mark that would bring out a figure of about

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Rs. 1,000,000 loss of trade, and taking 9 per cent. profit on that amount it gives a figure which, put into pounds sterling, would come out at a sum of £4,500. That, however, does not give anything for a possible increase of trade and their Lordships think that on a rough calculation £500 may be added for that, making £5,000, but as the decree must be in rupees it is equivalent to Rs. 67,000. Their Lordships, therefore, think that that is in this case the proper figure of damages.

As to costs their Lordships are of opinion that the decree as to costs in the Court below should stand and that there ought to be no costs before this Board.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court in appeal should be varied by substituting Rs. 67,000 for the amount of the damages, and that otherwise it should be affirmed and this appeal dismissed, but without costs.

Solicitors for appellants: *Douglas, Grant & Dold.*

Solicitors for respondents: *Latty & Dawe.*

K.J.R. *Appeal allowed in part.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.

Srimati Tara Kumari and another .. *Appellants**

v.

Tribeni Prasad Singh and another .. *Respondents.*

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Srimati Tara Kumari v. Tribeni Prasad Singh.

Appeal—Fact—Trial Judge's finding on—Reversal of—Propriety—Finding based not on Judge's personal observation of demeanour and mode of giving evidence of witnesses but on inference from agreed facts

Where, on a question of pure fact, the judgment of the Trial Judge was not based on what might be called his personal observation of the demeanour and mode of giving evidence of the witnesses whom he saw but proceeded by inference from agreed facts, *held,* that such a judgment did not give very much further advantage to the Judge of first instance over the Judges in the Court of Appeal.

Appeal No. 129 of 1926 from a decree of the High Court of Judicature at Patna.

De Gruyther, K.C. and *Wallach* for appellants.

Dunne, K.C. and *Hyam* for respondents.

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*P.C. Appeal No 129 of 1926. 19th October, 1928.

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Srimati Tara Kumari v. Tribeni Prasad Singh.

Lord Phillimore.

19th Oct. 1928. Their Lordships' judgment was delivered by

LORD PHILLIMORE.—Their Lordships have come to the conclusion that they do not require to hear Counsel for the respondents in this case. They think in the circumstances that they can deal with it quite shortly, and that too, with full respect to both of the Courts below. This is a question of pure fact, but one on which unfortunately the two Courts in India have differed. Their Lordships do not forget that the District Judge had certain advantages in that he saw all the witnesses except the two purdanashin ladies, and it is perfectly true that that Judge has believed some and disbelieved others of the witnesses. But it does not appear that he has acted on what might be called his personal observation of their demeanour and mode of giving evidence, but that he has in a very elaborate and careful judgment proceeded by inference from agreed facts. A judgment proceeding in that way does not give very much further advantage to the Judge of first instance over the Judges in the Court of Appeal. Both the judgments have been read carefully to the Board, and in the opinion of their Lordships there has not been sufficient reason shown for disturbing the conclusions at which the Judges of the High Court have arrived.

The appeal will therefore be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Watkins & Hunter.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD SHAW, LORD BLANESBURGH AND SIR JOHN WALLIS.

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Yellappa Ramappa Naik v. Tippanna.

Yellappa Ramappa Naik and others .. *Appellants** (*Defts.*)

v.

Tippanna bin Laxmanna Naik .. *Respondent* (*Plff.*).

Onus of proof—Doctrine of—True scope and applicability of—Facts established in case leaving no room for doubt—Application of doctrine so as to force a decision against—Propriety—Hindu Law—Joint family—Partition—Presumption of continuance of jointness—Scope and applicability of—Families removed by several generations from each other—Applicability of presumption to case of

*P. C. Appeal No 87 of 1926. 16th November, 1928

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Onus probandi applies to a situation in which the mind of the Judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion As a case proceeds the onus may shift from time to time. The doctrine of *onus probandi* should not be applied so as to oblige the Judge to be blind to facts established before him.

There is no doubt a presumption that a Hindu family continues joint; but the strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker

When it appears from facts that through generations a property has been possessed in a certain single line, it can never be said that it lies upon that line to establish that it was dissociated generations ago from another line which appears on the scene as a claimant and propones no facts of jointness, such as living in the same home, sharing in food or worship, or *quoad* estate participating in the enjoyment or fruits thereof. To put, in consequence of a stretch of the doctrine of onus, an unnatural and forced construction upon the actual facts of family life and development is not warranted either by the reason of the case or the law of India

Appeal No. 87 of 1926 from a decree of the High Court, Bombay (MacLeod, C.J. and Shah, J.), dated the 29th February, 1924, reversing a decree of the Court of the First Class Subordinate Judge of Belgaum, dated the 28th August, 1919, and decreeing a suit which he had dismissed.

The material facts of the case appear sufficiently from their Lordships' judgment.

Lowndes, K.C., Raikes and *McNair* for appellants.

The respondent was not represented at the hearing.

Lowndes, K.C.—The presumption of jointness becomes weaker and weaker the farther you go from the common ancestor: Mayne's Hindu Law, 7th edition, para. 268, and *Moro Vishvanath* v. *Ganesh Vithal*[1]. We have proved that the plaintiff was definitely excluded to his knowledge for over 12 years.

[*Sir John Wallis.*—How can we draw here the inference of exclusion?]

The initial presumption, of course, is of jointness. The parties were once joint, going very far back.

[*Lord Shaw.*—When you have in India a common ancestor, the property of that common ancestor is joint family property with his sons. That is the general presumption. In all cases of joint family, the question is, is there at this moment jointness? The question of jointness first arises with the sons. It never arises till the property has left the common ancestor.]

1 (1873) 10 Bom. H C R. 444 at 453, 468.

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We admit that at some time the property was the property of a joint family. That is the extent of our admission.

[*Sir John Wallis.*—See Strange's Hindu Law, Vol. II, page 347. That is not a work of very great authority, at least in Madras.]

The period of limitation is 12 years, from plaintiff's knowledge of the exclusion : Limitation Act, Article 127.

The Court must be satisfied that during that period the plaintiff had no possession or enjoyment of the family property. It is no longer a question of *onus probandi;* all the evidence being in, the question of onus becomes immaterial. If the Court is satisfied that the plaintiff did not live in the family house, that amounts to exclusion.

[*Lord Shaw.*—By exclusion, you don't mean any act of a Court of Law. It simply means, he is not included in the revenues of the property.]

When the entire evidence on both sides is once before the Court, the debate as to the onus is purely academical; *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2] and *Seturatnam Aiyar* v. *Venkatachela Goundan.*[3]

[*Sir John Wallis.*—If we are in possession of all the facts, the question of onus may go by the Board.]

[*Lord Blanesburgh.*—Would not living in the joint family without messing be sufficient to rebut the inference of exclusion?]

No ; you must have jointness in food, worship and estate.

[*Sir John Wallis.*—Ramesam, J., said the other day in a case from Madras that parties may be joint though there is no joint worship and joint mess; see *Konammal* v. *Annadana Jadaya Gounder*[4].]

That may be so in Madras, but in Bombay it is established law that you must have jointness in food and worship as well.

16th Nov. 1928. Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW.—This is an appeal from a decree of the High Court of Judicature at Bombay. It was dated the 29th February, 1924, and it reversed a decree of the Court of the First Class Subordinate Judge of Belgaum, dated the 28th August, 1919.

2. (1922) I.L.R 45 M. 586 at 607: L.R. 49 I.A. 286. 43 M.L J. 640 (P.C.)
3. (1919) I.L.R 43 M. 567 at 577: L.R. 47 I.A 76· 38 M.L.J. 476 (P.C.).
4 (1927) 54 M.L.J. 504 at 516 (P.C).

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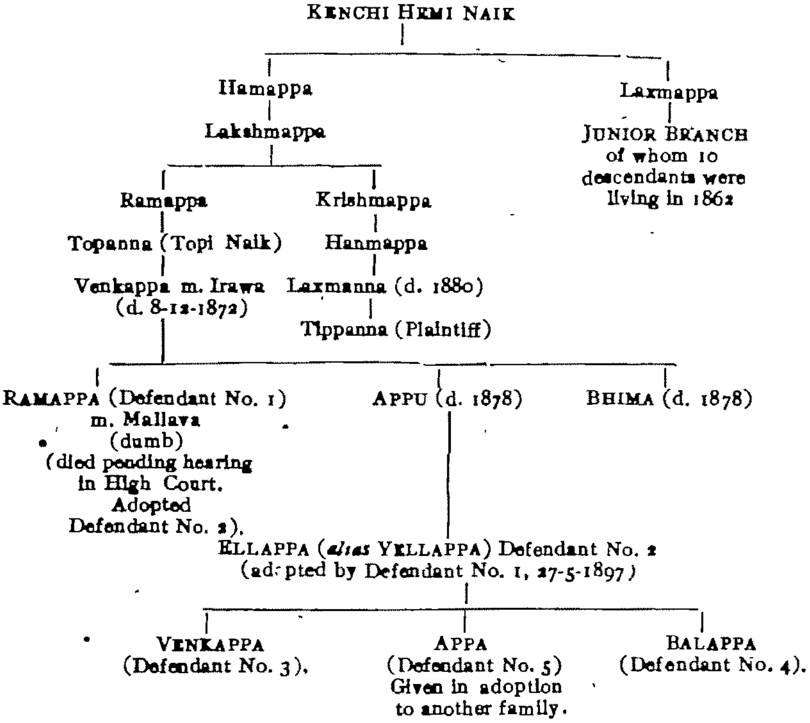
The suit was brought by the respondent for a half share in property possessed by the appellants for many years as after mentioned.

The appellants were distant kinsmen of the respondent.

The family genealogy is thus set out:—



The suit was brought in 1916. The case was most carefully tried by the Subordinate Judge. One cannot peruse his judgment and the relative evidence without being struck by the accuracy and minuteness of his exposition and the apparent correctness of his conclusions.

Had the case been considered by the High Court as one to be determined merely upon the facts proved, their Lordships do not doubt that that Court would have reached the same conclusion as the Subordinate Judge. The High Court, however, in a brief deliverance, reversed the judgment substantially upon the ground of their view as to the *onus probandi* in allegations as to joint family property.

First as to the facts. Their Lordships agree in substance with the Subordinate Judge's narrative and only add

this brief summary. The property is *naiki watan* (police service land) in the village of Manyal in the Kagwad State. It was annexed by the Government in 1858. The property being under attachment owing to a failure to pay *jodi* or quit rent, a Government enquiry was ordered. That took place in 1862. There were rival claimants belonging to two branches of the family. The property, however, stood in the quit-rent book as in the possession to the extent of 681 acres in the name of Venkappa, the father of the first defendant. Venkappa was the senior member of the senior branch of the family; treating, for the moment, the family of which Lakshmappa was the common ancestor as one branch. There was a junior branch, and one Yellappa stood in the quit-rent book for the balance of 67 acres. Apart from the book the results of an enquiry held by the Mamlatdar was that so far as the whole property was concerned it was undoubtedly in Venkappa's possession, that he resisted the idea of there being any joint family interest in it or any other person with title thereto. In these circumstances, the year being 1862, the Government left it to any one who so wished to bring a suit to establish their right.

No such suit was ever brought and no claim on behalf of the junior branch has ever since been made. The property remained in Venkappa's possession from that time, 1862, that is to say, 54 years before the present suit, until his, Venkappa's death. That event occurred in 1872, namely 44 years before the suit, and from that time the successors of Venkappa reaching down to the present appellants have continued exclusively to possess the property, and pay the *jodi* thereof.

On Venkappa's death a question arose as to who was to occupy the position of police patil. Venkappa had a family, the eldest of whom, Ramappa, was dumb. But there was a younger son, Bhima, who performed the service of police patil for him. During this period and until the death of Bhima in 1878, neither the plaintiff, Tippanna, nor his father Laxmanna, raised any objection to these proceedings or put forward any claim either to the property or to any office in connection therewith.

Thereafter, Irawa, the widow of Venkappa, applied in 1882 on behalf of the dumb son, Ramappa, for permission to appoint the police patil. In her petition she stated that in her house there were none who could do the work and she herself

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suggested the name of the plaintiff, Tippanna, for the office, describing him as one of her distant kinsmen, or baumgand; and it was in support of the claim so made for him, the date being 1882, that he alleged for the first time that he was a kinsman having a half share in the *naiki watan*.

This in truth is substantially the only connection of Tippanna with the idea of a joint family, or of any title to the property as a co-sharer thereof. His father, Laxmanna, had never in his lifetime made any such claim. Whether the clause quoted was inserted in order to fortify the title of Tippanna to the widow's nomination of him as patil, or not, cannot now be decided. He or his advisers at all events must have thought that it was relevant to that appointment.

In 1894 the plaintiff's second term of appointment as patil expired. Irawa had died in the meantime. The successors of Venkappa's branch were quite willing that the plaintiff—distant relative though he was—should be continued as police patil. The position of the plaintiff was by this time quite clear. He himself gave his own description as a distant kinsman of the representative Watandar. The contrast between that and the situation in 1822 was this, that in 1895 he made no suggestion, as on the former occasion, that he had a half share of the property.

The Mamlatdar made an enquiry and he took his own line. Since the first appointment in 1872 the younger generation had grown up ; and Yellappa of the Venkappa branch (being the adopted son of Ramappa, one of Venkappa's family) was appointed. The plaintiff in his statement shows that he consented to his own supersession and had no objection to Yellappa's appointment. This occurred in the year 1895, 21 years before the suit was brought.

It is a circumstance of note, as mentioned, that in these later transactions he made no representation of the suggestion that he had a half share in the property. Apart from these quasi administrative proceedings, there is no doubt cast upon the general point of possession of the property. Their Lordships do not enter into details but they agree with the Subordinate Judge in holding that the plaintiff never did in fact possess or pay *jodi* for any part thereof; and that he never was occupying the same house with the appellants and never was joint with them or their predecessors in food, in worship, or in estate. So far as the facts go, that is how, sketched in out-

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line, they stand. On these facts—stated in full detail in his judgment—the Subordinate Judge was against the plaintiff's claim.

The judgment of the High Court is, however, to the effect that many years ago, at least three generations ago, it must be concluded that there was a joint family, and that in these circumstances the duty and onus lie upon the appellants who and whose ancestors have been in undisputed sole possession of the property for the long tract of time referred to, to establish that the "plaintiff's branch had been excluded to their knowledge for more than 12 years before the suit."

In the opinion of the Board this, which is the sole ground of the High Court's judgment, is an improper application and an undue stretch of the doctrine of *onus probandi* in such cases. In any case *onus probandi* applies to a situation in which the mind of the Judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time. There never is any duty upon the part of the Judge to be blind to facts established before him, or, as in this case, to a whole category of facts extending over a long period of time and establishing the possession of property for generations as being in one line and not in two lines. (See *Robinson* v. *National Trust Company*,[5] Lord Dunedin's judgment.)

It is no doubt true that there is a presumption that a Hindu family continues joint, but the sound proposition has for many years been accepted that—

> "The strength of the presumption necessarily varies in every case The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker."

Thus properly cited by Mr. Mayne in his work on Hindu Law. The citation is from *Moro Vishvanath* v. *Ganesh*[1], which is now and has long been a leading and authoritative judgment. Their Lordships think it advisable to quote from it further the following statement of the law made by Mr. Justice West:—

> "The state of things shown to have existed is presumed to have continued, until the contrary be shown But it is not inconsistent with this doctrine, and is, indeed, obvious that, as the course of nature itself brings about inevitable changes in a family, the presumption is one which grows weaker at each stage of descent from the common ancestor. Brothers are for the most part united; second cousins are generally separated. After a considerable lapse of time, testimony of the precise terms

1 (1873) 10 Bom. H.C.R 444. 5 (1927) A.C. 515 at 520.

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on which a partition was effected, and of the precise time at which it was made, will, in most cases, be wanting. The presumption that the old state of things continued, is, at some point, met by the presumption that the present state of things had a legal origin, and it cannot be said that the Hindu Law, in the form in which it has come down to this generation, looks on all separation of families with disfavour."

The proposition is indeed one which speaks for itself apart from judicial authority. When it appears from facts that through generations a property has been possessed in a certain single line, it can never be said that it lies upon that line to establish that it was dissociated generations ago from another line which appears on the scene as a claimant and propones no facts of jointness, such as living in the same home, sharing in food or worship, or *quoad* estate participating in the enjoyment or fruits thereof. To put, in consequence of a stretch of the doctrine of onus, an unnatural and forced construction upon the actual facts of family life and development is not warranted either by the reason of the case or the law of India.

To apply these principles to the present case: The common ancestor was one Lakshmappa. He had two sons, Ramappa and Krishmappa. From the former (Ramappa) the defendants' family was descended; they are his grandsons and great-grandsons. The plaintiff's family are descended from Krishmappa. The relationship between the plaintiff himself and the defendants is that he is their third or fourth cousin, he being the great-grandson of Krishmappa and the great-great-grandson of the common ancestor Lakshmappa. The idea that solely out of such circumstances there is some presumption of jointness in family, or—which is the true proposition—that a family originally joint has continued in jointness to this day, there being no other evidence of that, but on the contrary evidence of undisptued separate enjoyment, is not one which their Lordships can support.

Should such presumption be allowed to enter the case it would immediately be countered by the broad and undisputed facts as above sufficiently set forth.

It follows also from this that the suit is excluded by the 12 years' limitation prescribed in Article 127 of the Limitation Act, 1908.

The foundation of the High Court's judgment is therefore destroyed: and their Lordships see no reason to doubt that the judgment of the Subordinate Judge should be restored.

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They will accordingly humbly advise His Majesty that the appeal should be sustained with the restoration as stated, and with costs thereafter and of this appeal.

Solicitors for appellants : *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE REILLY.

A. R. Arumugaswami Nadar (representative-in-interest of A. R. Ponnuswami Nadar) .. *Appellant** (*Representative of the 12th Deft.*)

v.

Kumara Ettapaswami, Maniagarar, late a minor, since declared major and guardian discharged—*vide* Order, dated 13th Dec. 1927 on C.M.P. No. 2540 of 1927 and others .. *Respondents* (*Plffs. and Defts.*).

Arumugaswami Nadar v. Kumara Ettapaswami.

Charge—Interpleader suit regarding zamindari—Reference to arbitration—Razinamah by parties before arbitrator—Award in terms of razinamah—Decree in accordance with award—Allotment of share of properties to a defendant—Direction that that defendant should pay maintenance allowance charged upon this share to one not a party to the suit—Right of latter to enforce the charge.

Where in an interpleader suit regarding a zamindari there was eventually a decree in accordance with an arbitrator's award which merely embodied a razinamah put in by the parties before the arbitrator and the decree while allotting a share of the properties to one of the defendants directed the payment by him of a maintenance allowance charged upon this share of the properties to one who was not a party to the suit and his heirs,

Held, that the latter and his heirs can enforce the charge created by the decree although he was not a party to the suit in which the decree was passed.

Hira Singh v. Ganga Sahai, (1883) I.L.R. 6 All. 322: L.R. 11 I.A. 20 (P.C.) distinguished.

Appeal against the decree of the District Court of Ramnad at Madura in A.S. No. 196 of 1920 preferred against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O.S. No. 13 of 1919.

B. Sitarama Rao, K. Rajah Aiyar and *S. Nataraja Nadar* for appellant.

R. Kuppuswami Aiyar for 1st respondent.

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*S. A. No. 112 of 1926. 10th December, 1928.

Arumuga-swami Nadar v. Kumara Ettapa-swami.

Reilly, J.

The Court delivered the following

JUDGMENTS. *Reilly, J.*—In this case the plaintiff has obtained a decree to enforce a charge in his favour for a maintenance allowance, and defendant 12, who has obtained a mortgage-right over some of the property concerned, appeals. Mr. Sitarama Rao for defendant 12 has urged two points before us. His first argument is that neither the plaintiff nor his father was a party to the proceedings in which this charge was created. It appears that in O.S. No. 63 of 1899 on the file of the Additional Subordinate Judge of Tinnevelly, which was an inter-pleader suit regarding the Vadimitta Zamindari, there was eventually a decree in accordance with an arbitrator's award; but that award merely embodied a razinamah put in by the parties before the arbitrator. In accordance with that decree the present defendant 1 got one-fourth of the Zamindari but was bound to pay a maintenance allowance to the plaintiff's father and his heirs, charged upon part of the one-fourth of the Zamindari which defendant 1 obtained by the decree. The plaintiff's father was not a party to that suit, and therefore Mr. Sitarama Rao contends that the plaintiff cannot enforce the charge created by that decree. For this he relies upon *Hira Singh* v. *Ganga Sahai*[1]. In that case under an award between other parties certain property was allotted by the arbitrator to a person who had no legal right to it and who was not a party to the arbitration. Their Lordships of the Privy Council held that that person could not sue to enforce the award in his favour. To my mind that case embodies little more than an aspect of the general rule that a person cannot sue on a contract to which he is not a party. If *A* and *B* contract that one of them shall make a payment to *C*, *C* cannot sue on that contract. But it does not follow from that rule that a *cesti que trust* cannot sue to enforce the trust in his favour, though he had nothing whatever to do with its creation, or that a person in whose favour a charge is created on immoveable property cannot enforce that charge merely because he has not been a party to the transaction or proceedings in which the charge was created. In *Khwaja Muhammad Khan* v. *Husaini Begam*[2] there was an agreement between a bride's father-in-law and her parents that the father-in-law should make a monthly payment to the bride, and that was charged upon immoveable property. Their Lordships of the Privy Council held that, though the bride was not a party to

1. (1883) I L R 6 A 322· L.R. 11 I A. 20 (P.C).
2. (1910) I.L.R. 32 A. 410: L R. 37 I.A. 152. 20 M.L.J. 614 (P.C.).

Arumugaswami Nadar v. Kumara Ettapaswami. Reilly, J.

that transaction, she was entitled in equity to enforce the charge. They held that the principle of *Tweedle* v. *Atkinson*[3] did not apply to such cases. In this Presidency in *Shuppu Ammal* v. *Subramanian*[4] it was decided that a mother was entitled to sue to enforce a charge created in her favour by her sons in a partition between them to which she was not a party. It will be noticed that in both those cases not only was there any charge but a charge created in circumstances of some sort of family settlement. The present case cannot be distinguished from those cases on that ground because the plaintiffs and his father were members of a Zamindari family and entitled to some consideration and maintenance on that account. Other cases have been quoted before us in which persons have been permitted to enforce claims arising out of family settlements to which they have been no parties, even though there has been no charge in their favour; but it is unnecessary to consider them in the present case, as we have a definite charge, on which the plaintiff rests his claim. Mr. Sitarama Rao seeks to distinguish the case to bring it within the scope of the decision in *Hira Singh* v. *Ganga Sahai*[1] by pointing out that the charge here arose out of an award. I doubt whether the fact that a charge was created by an award would by itself be sufficient to prevent the charge-holder from enforcing it when he was not a party to the award. But in this case it happens that, although the decree proceeds formally on the arbitrator's award, the award itself merely embodies the razinamah between the parties to O.S. No. 63 of 1899. In my opinion the plaintiff is entitled to enforce the charge.

Mr. Sitarama Rao's second contention is that the plaintiff has lost his right to enforce the charge in consequence of what happened in another suit, O.S. No. 42 of 1901 on the Sub-Judge's file. In that case one Nachiappa Chetti sued the present defendant 1, his son and the plaintiff's father on the basis of a mortgage of a previous maintenance allowance by defendant 1 and the plaintiff's father in favour of his assignor and asked originally for a decree against defendant 1, his son and the plaintiff's father enforcing the mortgage against certain property. In the end there was a razinamah decree in that suit, by which Nachiappa Chetti got a decree for money and also a right to sell certain items of property. Mr. Sitarama Rao

1. (1883) I.L.R. 6 A 322: L.R. 11 I.A. 20 (P.C.).
3 (1861) 1 B. & S. 393: 121 E.R. 762.
4. (1909) I.L.R. 33 M. 238: 19 M.L.J. 739.

Arumugaswami Nadar v. Kumara Ettapaswami. Reilly, J.

points out that the plaintiff's father, though he was not a party to the razinamah in that suit, informed the Court through his vakil that he had no objection to a decree being passed in accordance with the razinamah, and in it no provision was made for this charge which the plaintiff is suing to enforce. Mr. Sitarama Rao argues that, the plaintiff's father having failed to get his charge reserved in that proceeding, the plaintiff cannot now enforce it. When we examine what happened in that suit more carefully, we find that the razinamah decree eventually made a new arrangement in favour of Nachiappa Chetti. In the razinamah on which the decree was based it is explained that Nachiappa Chetti sued to get a mortgage decree against certain items of property, which defendant 1 had got in his share of the Zamindari, in O.S. No. 63 of 1899. Even in regard to those items Nachiappa Chetti did not get an ordinary mortgage decree for the sale of them on the basis of the mortgage on which he sued. He got a rather curious decree, by which defendant 1 and his son were to pay him Rs. 7,250 in instalments spread over a considerable period and, in default, a charge on four out of the items which he had included in his suit. It appears to me that what Nachiappa Chetti got in that case was not a decree on the mortgage on which he was suing but a money decree and a new charge in accordance with the terms of the razinamah, which was something quite different from the mortgage on which he was suing. If that is so, then the charge which the plaintiff's father had got through the razinamah decree in O.S. No. 63 of 1899 was obviously prior to the charge which Nachiappa Chetti got by the decree in O.S. No. 42 of 1901. In that view of the case the plaintiff's father might well say that he was quite willing that such a decree should be made charging defendant 1's property; he was not concerned, and he had no objection because it did not affect the charge which he had obtained under the decree in O.S. No. 63 of 1899 as indeed it did not. In that view of the case, in my opinion, this contention also of Mr. Sitarama Rao fails.

Therefore without going into the discussion which has been raised about the identity of the items of property in this case and the way in which defendant 12 put his pleadings I think it is clear that this appeal should be dismissed with the plaintiff's costs.

Jackson, J.—I agree.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI.

G. D. John .. *Plaintiff**

v.

K. P. Sambamurthy Aiyar (deceased) and others .. *Defendants.*

The Oriental Government Security Life Assurance Company, Limited .. *Garnishees.*

G. D. John v. Sambamurthy Aiyar

Insurance—Policy—Provision for payment of policy amount on proof of death—Garnishee summons against Life Assurance Company—Proof of death not furnished before the taking out of the summons—Right of Company to resist order—Company having head office at Bombay and agency at Madras—Company acting merely as Post Office at Madras having no independent discretion—If can be said to carry on business at Madras—Original Side Rules, O 20, R. 1.

Where a policy issued by a Life Assurance Company provided for the payment of the policy amount "on proof to the satisfaction of the Directors of the death of the assured,"

Held, that the policy amount cannot be said to be a debt due by the Company before the proof is given of the death of the assured in such manner as the rules of the Company require or, if no rules have been framed by the Company, as the Company thinks sufficient to enable a reasonable man to be satisfied as to the death of another, and consequently the Company can resist any garnishee order if, at the time of the taking out of the garnishee summons, such proof had not been given.

Where a Life Assurance Company which has its head office at Bombay has an agency at Madras which does nothing but act as a Post Office forwarding proposals and sending moneys to the head office and has no discretion in the matter either to conclude contracts or to vary them or to enter into them, the Company cannot be said to "carry on business" in Madras within the meaning of Rule 1 of Order 20 of the Original Side Rules.

Vere Mockett instructed by *S. Rajamanikkam* and *Messrs. Short Bewes & Co.* for Garnishees.

E. R. Balakrishnan for plaintiff.

G. A. Chelliah for Legal Representative of the deceased 1st defendant.

The Court delivered the following

ORDER.—This is an appeal from the order of the Master in garnishee proceedings instituted by the decree-holder in this suit against the Oriental Government Security Life Assurance Company, Limited, in respect of a policy taken out by one K. P. Sambamurthy Aiyar, the defendant in the suit, who is alleged to have died. It is stated that the policy amount has become

*C. S. No. 57 of 1926. 21st December, 1928.

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due and payable and the money is attached as a debt payable by the Life Assurance Company.

A copy of the policy has been filed and the terms of the policy are not in dispute. It says:

"..... the sum of Rs. 1,000 or such other sum as shall become due and payable by virtue of these presents, agreeably to the regulations of the Company, on proof to the satisfaction of the Directors of the death of the said assured or that he has completed the age of 50 years and of the title of the person claiming payment."

The amount of the policy is expressly made payable at Bombay. Rule 1 of Order 20 of the Original Side Rules runs as follows:

"This order applies in the case of (1) a debt due to a judgment-debtor, not secured by a negotiable instrument, (2) a debt secured by a negotiable instrument which has been attached under Order 21, Rule 51 of the Code, and (3) moveable property not in the possession of the judgment-debtor, when the person by whom the debt is due, or who is in possession of the moveable property, hereinafter called the 'garnishee,' resides, or carries on business, or personally works for gain within the local limits of the Court."

The Master ordered the Company to pay the amount due on the policy acting under this order.

Two objections are taken. The first is that, as proof of death to the satisfaction of the Company was not given at the time when the application was made, the Company is not bound to pay the money. The second objection is that the Company does not carry on business or personally work for gain or reside in Madras within the local limits of the Court. As regards the first objection it seems to me that, under the terms of the policy the Company is to be satisfied with the proof of death which has been furnished to it. The condition is,

"Rs. 1,000 or such other sum as shall become due and payable by virtue of these presents, agreeably to the regulations of the Company, on proof to the satisfaction of the Directors of the death of the said assured."

Before the money becomes a debt, that is, an obligation which has matured into an enforceable demand against the Company, this condition has to be satisfied, *viz.*, proof should be given of the death in such manner as the rules of the Company require. No doubt, if such proof is given, the Company cannot arbitrarily say that it is not proper proof, but it should be such proof of death as is ordinarily required by the Company under the rules, or as required by law to prove death. This was not done at the time of the taking out of the garnishee summons, and it seems to me that the Company can well resist any garnishee order until the condition requisite by the policy

has been satisfied, that is, until such proof is given as the Company requires or, if no rules have been framed by the Company, as the Company thinks sufficient to enable a reasonable person to be satisfied as to the death of another.

The other objection depends upon the question whether the Oriental Government Security Life Assurance Company, Ltd., carries on business in Madras. It is no doubt true that the Company has got an agency in Madras; but it is not stated that this agency has any directors here or any persons who form a kind of controlling board in Madras or at least have some discretions as regards the policies. The affidavit filed on behalf of the Company is to the effect that so far as the Madras office is concerned, it has no independent discretion in the matter but simply acts as a post office which receives applications or moneys and passes them on to the Head Office in Bombay, and that is the Head Office that issues all orders, there being no vestige of discretion in the local office here to do anything. These facts are not contradicted and the question is whether it can be said that the Oriental Government Security Life Assurance Company, Ltd., carries on business in Madras. I think this question is really concluded by the judgment of Beasley, J., in C.S. No. 257 of 1926 which was a suit filed by the Bombay Company, Ltd., Madras, against the Municipal Council of Dindigul. It was there shown that the representatives of the Bombay Company in Dindigul had no discretion except receiving orders and sending them on. The question was whether they carried on business in Dindigul to be taxed. It was held that they were not, and Beasley, J., in an elaborate review of the authorities states that there is no difference in principle between residence for purposes of either the Income-tax Act or the Municipal Act, or for purposes of jurisdiction. This judgment was affirmed by the Chief Justice and Madhavan Nair, J., in O.S. Appeal No. 6 of 1928 where all the authorities have been discussed by the learned Judges. I think that on the facts disclosed in the present case in the affidavit, namely, that the agency in Madras does nothing but act as a post office forwarding proposals and sending moneys and not having any discretion in the matter either to conclude contracts or to vary them or to enter into them, the Oriental Government Security Life Assurance Company does not carry on business in Madras. It was stated that a suit may lie under section 12 of the Letters Patent if the money is not paid. That may be so not on the ground that there is business carried on in Madras, but because the proposal

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was made in Madras and forwarded and part of the cause of action arose in Madras and on that ground leave may be given. I do not think we can confuse the fact of jurisdiction arising out of a part of the cause of action with jurisdiction arising out of the carrying on of business. Unfortunately, our rules do not provide for garnishee proceedings in cases where a part of the cause of action arises in respect of a debt sought to be enforced by garnishee proceedings.

Under these circumstances, I think the application of the Oriental Government Security Life Assurance Company, Ltd., should be upheld. The order of the Master is set aside.

The amount is a small sum of money Rs. 1,000, of which Rs. 800 and odd is now said to be due. The amount is payable to the widow of the deceased and has been attached by the creditors. The question is whether, having regard to the fact that the contention is purely one of law, I can allow costs. Having regard to the smallness of the amount and the fact that the Life Assurance Companies fight it more as a matter of principle than with any desire to be obstructive, I think that each party will bear his own costs.

N.S. *Order of Master set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

A. Muhamad Ellaiyas .. *Petitioner** (*1st Deft.*)

v.

Rahima Bee, late a minor by her husband and guardian K. M. Abdul Lateef Sahib, since declared a major—*vide* Order, dated 28—2—28 on C.M.P. No. 33 of 1928 .. *Respondent* (*Plaintiff*).

Muhamad Ellaiyas v. Rahima Bee.

Civil Procedure Code, S 115—*Order that Court-fee paid is correct—If revisable by High Court*

An order of the Lower Court that the Court-fee paid by the plaintiff on his plaint is correct is not revisable by the High Court, though an order that the Court-fee paid on the plaint is wrong is revisable

Kulandaivelu Nachiar v. *Ramaswami Pandia Thalavan*, (1927) I L R. 51 M. 664: 55 M L.J. 345 distinguished.

Falkner v. *Mirza Mahomed Syed Ali*, (1924) 29 C.W.N. 627 referred to.

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*C. R. P. No. 1172 of 1927. 22nd October, 1928.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Vellore, dated 19th April, 1927, and passed in O. S. No. 27 of 1926.

V. Ramaswami Aiyar for petitioner.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for respondent.

The Court delivered the following

JUDGMENT.—The question I have to decide is, whether a Civil Revision Petition lies against the order of the Subordinate Judge holding that the plaintiff has paid on his plaint the proper Court-fee, the objection to the contrary by the defendant being overruled. The defendant complains in this petition that the order of the Lower Court regarding Court-fee is wrong, and a preliminary objection has been taken that the petition does not lie. In my opinion, the objection is well founded.

It is hardly necessary to state that I do not base my judgment on the ground that interlocutory orders made in a suit are not liable to be revised by the High Court. As a matter of fact, in the case of various kinds of interlocutory orders the High Court exercises its powers of revision. Where in regard to the Court-fee payable, the decision of the Lower Court is unfavourable to the plaintiff, it has been held that the High Court can in revision interfere with that decision. This is the view I took in *Karuppanna Thevar* v. *Angammal*[1] and in *Venkataramani Aiyar* v. *Narayanaswami Aiyar*[2]. Kumaraswami Sastri and Wallace, JJ., adopted the same view in *Kulandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*[3] where the learned Judges review the authorities on the point. In the present case, the question arises in a different way. The decision is not against the plaintiff, but it does not follow that it is against the defendant. As has been pointed out by the Judicial Committee in *Rachappa Subrao* v. *Shidappa Venkatrao*.[4]

> "The Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State" (page 518)

Where an order in regard to Court-fee happens to be in favour of the plaintiff, it does not mean that it is against the

1. (1926) 51 M.L.J. 67.
2. (1924) 48 M L J. 688.
3. (1927) I.L.R. 51 Mad 664 55 M.L.J. 345
4. (1918) L.R. 46 I.A. 24: 43 Bom. 507: 36 M.L.J.437 (P.C.).

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defendant, though it may operate "to the detriment of the revenue." (*See* section 12 of the Court Fees Act.)

As has been pointed out in *Kulandaivelu Nachiar* v. *Ramasami Pandia Thalavan*,[3] which I have just cited, where the order is unfavourable to the plaintiff it may result in great hardship to him, and the interests of justice may demand that the High Court should at once rectify the error, without waiting till the suit is finally decided and an appeal is then filed. But if the Lower Court's order which is favourable to the plaintiff happens to be wrong, there is another remedy open, which is quite adequate, as the mistake can be corrected by the Appellate Court under section 12 of the Court Fees Act, which uses language which is very significant. It runs thus:—

"But whenever any such suit comes before a Court of Appeal, Reference or Revision, if such Court considers that the said question has been wrongly decided, *to the detriment of the revenue*, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section 10, paragraph (ii) shall apply."

There is very little authority on this point, but such authority as there is, supports the view I am disposed to take. In *Falkner* v. *Mirza Mahomed Syed Ali*[5] the learned Judges point out the difference between a case where the order is in favour of the plaintiff and where it is against him and express the view that whereas a Civil Revision Petition lies in the latter case, it does not in the former. I have come to the conclusion that the petition fails and it is dismissed with costs.

N.S. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Mohammad Wajid Ali Khan .. *Appellant** (*Deft.*)

v.

Puran Singh and others .. *Respondents* (*Plffs.*).

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Pre-emption—Suit by several co-sharers against stranger-purchaser for—Scope and nature of—Plaintiffs' rival claimants to pre-emption—Plaintiffs not so claiming—Decree for plaintiffs in suit—Form of, in former case—Civil Procedure Code, O 20, R 14 (2)—Effect of decree when plaintiffs not rival claimants—Appeal against decree in such a case—Abatement of, as against one of plaintiffs—Effect of, as regards other

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*P. C. Appeal No. 67 of 1927. 6th December, 1928.

3. (1927) I.L.R. 51 M 664: 55 M.L.J. 345.

5. (1924) 29 C.W.N. 627 at 629.

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plaintiffs—Pre-emption right of representatives of deceased plaintiff pursuant to first Court's decree—If extends to whole property or confined to share of deceased only—Legal practitioner—Appeal—Respondents in—Practitioner appearing for—Death of one of respondents—Duty of practitioner to inform Court of

A practitioner who appears for several respondents, one of whom dies before the hearing of the appeal, owes a clear duty to the Court to bring to its notice if he is aware of it the fact that one of the respondents for whom he has entered appearance is dead and no longer represented by him.

Where the custom of pre-emption obtains in a village every co-sharer has a right to pre-empt a stranger purchasing land in the village When several co-sharers desire to exercise this right, and there are differences between them as to their shares or priorities, they may join as plaintiffs in a suit for pre-emption against the stranger-purchaser, and may obtain in that suit a decision, not only as to their right to pre-empt, but also as to their rival claims and a decree, as provided in O. 20 of the Code of Civil Procedure, R 14, sub-section 2, in accordance with which each pre-empting plaintiff will be entitled in default of the others to pre-empt alone. On the other hand, two or more co-sharers may simply sue the stranger-purchaser for pre-emption without asking the Court to adjudicate on their rival claims, and may obtain a decree for possession on depositing the pre-emption money in Court. The effect of that decree is to establish, as against the defendant, the right of each of the plaintiff-co-sharers to pre-empt him and to entitle them to possession on depositing the pre-emption money, leaving them to adjust their shares and priorities among themselves, these being matters in which the defendant has no concern so long as the pre-emption money is secured to him.

If the defendant files an appeal from such a decree making all the plaintiffs respondents, and one of the respondents dies before the hearing of the appeal and the appeal abates as against him under the express provisions of O 22 of the Civil Procedure Code, R. 4, sub-section 3, read with R 11, because his legal representatives have not been brought on the record within the time limited by law, and the appeal is heard in the absence of the legal representatives of the deceased respondent, and the decree of the first Court is reversed and the suit dismissed as against all the plaintiffs, it is clear that the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree and are entitled to exercise the right of pre-emption which the decree of the first Court established in his favour against the defendant, that is a right to pre-empt the whole. A stranger-purchaser cannot be required to submit to a partial pre-emption nor is he entitled to demand it. The abatement of the appeal as against the deceased plaintiff does not make it impossible to proceed effectively with the hearing of the appeal as against the surviving plaintiffs and render the judgment and decree of the Appellate Court passed in the absence of the representatives of the deceased plaintiff a complete nullity.

Appeal No. 67 of 1927 from a decree of the High Court at Allahabad, dated the 11th July, 1924, which varied an order, dated the 28th March, 1923, made by the Court of the Subordinate Judge of Bulandshahr.

The litigation arises out of a suit for pre-emption in which four plaintiffs obtained a joint decree and possession of the pre-

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empted property. On appeal, the Appellate Court set aside the decree of the Court of first instance. In the execution proceedings for the restoration of the property that followed, it was discovered that the appeal was heard and decided in the absence of the legal representatives of one of the plaintiffs-respondents who died during the pendency of the appeal.

The question for determination now was whether, in the circumstances of the case, the appellate decree was a nullity as to the whole of the pre-empted property or only as to one-fourth thereof as representing the share of the deceased plaintiff-respondent.

The Court of the Subordinate Judge in the execution proceedings before it held that the appellate decree was a nullity as to the whole of the pre-empted property, but that the benefit of the decree of the Court of first instance inured only to the legal representatives of the deceased plaintiff.

The High Court, on appeal, held (by a majority), agreeing with the Subordinate Judge, that the appellate decree was a nullity as to the whole of the pre-empted property, but differing from him, held that the benefit of the decree of the Court of first instance inured to all the plaintiffs in the suit.

The judgment of the High Court (Mookerji and Dalal, JJ., and of the Bench hearing the reference, Daniels and Neave, JJ.), are reported in I.L.R. 47 A. 100, where the relevant authorities are cited and discussed.

De Gruyther, K.C. and *Dube* for appellant.

Hyam for respondents.

6th Dec. 1928. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—In this case Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh, who were co-sharers in the village of Bighepur, filed a suit for pre-emption of certain land which the defendant Mohammad Wajid Khan, who is the present appellant, had purchased in the village. The sole question in the case was whether the custom of pre-emption obtained in the village, and the Additional Subordinate Judge of Aligarh having found this issue in favour of the plaintiffs gave them a decree for possession on their depositing the pre-emption money in Court. They duly deposited the money and obtained possession in execution of the decree.

It was suggested for the first time before the Board that the fourth plaintiff Pirthi Singh, who actually deposited the money

in Court and obtained possession was the only plaintiff who executed the decree, and that the right of the other decree-holders and their legal representatives to execute had become barred by limitation. In their Lordships' opinion there is no foundation for this contention. The application for execution of the decree, which was signed by all the four decree-holders, stated that the money had been deposited by them and prayed that possession might be given to them. The execution proceeded upon this basis and in reply to objections subsequently raised by the defendant Pirthi Singh himself stated that the decree-holders had obtained possession. It is clear therefore that the deposit was made and possession obtained on behalf of all the decree-holders.

The defendant appealed to the High Court at Allahabad making all the plaintiffs parties to the appeal. When the appeal came on for hearing Amar Singh, the third plaintiff, had been dead for about a year and his legal representatives had not been brought in the record. These facts were not brought to the notice of the Court, and the appeal was allowed to proceed on the footing that he was before the Court, and the appellate decree recites that he had been duly represented at the hearing, whereas in fact he had died and the authority to represent him had determined. Their Lordships are not in a position to say how this regrettable omission came about, and will only observe generally that it cannot be too clearly understood that a practitioner who appears for several respondents, one of whom dies before the hearing of the appeal, owes a clear duty to the Court to bring to its notice if he is aware of it the fact that one of the respondents for whom he has entered appearance is dead and no longer represented by him. Had the Court been apprised of the fact, as it should have been, the questions now before the Board could have been decided at the hearing of the appeal and this subsequent litigation would have been unnecessary.

As it was, the surviving respondents allowed the appeal to be heard without objection in the absence of the third plaintiff and his legal representatives, thus taking the chance of succeeding on the merits; and when they had failed and the decree of the Lower Court had been reversed and the suit dismissed and the defendant had obtained formal restitution of possession in execution of the appellate decree, they joined with the representatives of the deceased third plaintiff in putting in the application to the Subordinate Judge, which is the sub-

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ject of this appeal to His Majesty in Council, objecting that the whole appeal had abated by reason of the representatives of the third plaintiff not having been brought on the record within the time limited by law and that the appellate decree was a nullity and did not entitle the defendant to restoration of possession. They accordingly prayed that the order which the defendant had obtained without notice to them might be set aside and that they might be put in possession again.

On this application the Subordinate Judge ruled that the three surviving plaintiffs had no *locus standi,* as under the provisions of the Code of Civil Procedure the appeal had only abated as to the deceased plaintiff, and the survivors were bound by the appellate decree. As against the representatives of the deceased plaintiff he held that by reason of the abatement the appellate decree was not binding on them and that they were entitled to possession in execution of the decree of the first Court, if the other plaintiffs acquiesced in the pre-emption money, which was still in Court, being paid to the defendant, which they did by their Counsel at the hearing of the appeal from this order as stated in the judgment of Mukerji, J. In other words he held that the defendant was not entitled to restoration of possession as against them if they were prepared to pre-empt him.

The defendant and the surviving plaintiffs both preferred appeals against this order and the defendant also applied to the High Court under O. 47 of the Civil Procedure Code for a review of the appellate judgment, and an order that the abatement should be set aside and the appeal re-heard in the presence of the representatives of the deceased respondent. The Court rejected the grounds for review put forward by the defendant and held that the allegation that there had been a conspiracy to conceal the death of the third plaintiff from the appellant was not made out, and that he knew of the death and had been guilty of laches. They accordingly refused to set aside the abatement and dismissed the application for a review of judgment.

Consequently, as regards the deceased plaintiff, the abatement stands and cannot now be questioned.

The appeals from the order of the Subordinate Judge subsequently came on for hearing when the two learned Judges differed, Mukerji, J. being of opinion that under the provisions of the Code of Civil Procedure the appeal had abated as regards

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the deceased third plaintiff and no further, and that by virtue of the abatement his representatives were entitled to a one-fourth share of the property; while Dalal, J., held that the whole appeal had abated and that the surviving plaintiffs also were entitled to be restored to possession. In consequence of this difference of opinion there was a reference under section 98, sub-section 2, of the Code of Civil Procedure to another Bench, which held that the whole appeal had abated and that the appellate decree was incapable of execution.

In accordance with this answer to the reference the defendant's Appeal No. 202 of 1923 was dismissed, and the appeal of the surviving plaintiffs, No. 281 of 1923, was allowed, and they were restored to possession.

The defendant then obtained leave to appeal to His Majesty in Council from the order of the High Court dismissing his appeal No. 202 of 1923.

In dealing with the questions which arise in this appeal it is desirable in their Lordships' opinion to refer in the first place to the scope and nature of the present suit. Where the custom of pre-emption obtains in a village every co-sharer has a right to pre-empt a stranger purchasing land in the village. When several co-sharers desire to exercise this right, and there are differences between them as to their shares or priorities, they may join as plaintiffs in a suit for pre-emption against the stranger-purchaser, and may obtain in that suit a decision, not only as to their right to pre-empt, but also as to their rival claims and a decree, as provided in Order 20 of the Code of Civil Procedure, Rule 14, sub-section (2), in accordance with which each pre-empting plaintiff will be entitled in default of the others to pre-empt alone. On the other hand, two or more co-sharers may simply sue the stranger-purchaser for pre-emption, as in the present case, without asking the Court to adjudicate on their rival claims, and may obtain a decree for possession on depositing the pre-emption money in Court. In their Lordships' opinion the effect of that decree is to establish, as against the defendant, the right of each of the plaintiff co-sharers to pre-empt him and to entitle them to possession on depositing the pre-emption money, leaving them to adjust their shares and priorities among themselves, these being matters in which the defendant has no concern so long as the pre-emption money is secured to him.

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This being the nature of the suit and the effect of a decree for the plaintiffs, if the defendant files an appeal from such a decree making all the plaintiffs respondents, and one of the respondents dies before the hearing of the appeal and the appeal abates as against him under the express provisions of Order 22 of the Civil Procedure Code, Rule 4, sub-section (3), read with Rule 11, because his legal representatives have not been brought on the record within the time limited by law, and the appeal is heard in the absence of the legal representatives of the deceased respondent, and the decree of the first Court is reversed and the suit dismissed as against all the plaintiffs, it is clear that the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree and are entitled to exercise the right of pre-emption which the decree of the first Court established in his favour against the defendant, that is a right to pre-empt the whole. A stranger-purchaser cannot be required to submit to a partial pre-emption nor is he entitled to demand it; and their Lordships are therefore unable to accept the view of Mukerji, J., in the High Court that in the circumstances of this case the representatives of the deceased plaintiff only became entitled to pre-empt one-fourth of the suit property, leaving the defendant in possession of the remainder. They do not find any satisfactory grounds on which such a limited right can be based.

These were substantially the grounds on which the Subordinate Judge ruled against the defendant, and their Lordships prefer this view to that taken by the majority of the learned Judges in the High Court that in this suit the abatement against the deceased plaintiff made it impossible to proceed effectively with the hearing of the appeal as against the surviving plaintiffs, and rendered the judgment and decree of the appellate Court passed in the absence of the representatives of the deceased plaintiff a complete nullity so that the surviving plaintiffs were entitled to be restored to possession in accordance with the decree of the first Court along with the representatives of the deceased plaintiff. With this view their Lordships are unable to agree.

In their Lordships' opinion the order of the Subordinate Judge was right, and the decree of the High Court, dated the 11th July, 1924, ought to be set aside and in lieu thereof it ought to be declared that the representatives of the third plaintiff—fourth and fifth respondents here—are entitled to re-delivery of possession, on condition that the money deposited in Court

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should be made over to the appellant with the consent of all the other respondents within three months of the date of the order herein, otherwise the suit is to be dismissed; but that there ought to be no costs either in the High Court or of this appeal, and any costs paid under the decree ought to be returned. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polok.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Kasia Pillai *alias* Subramania Pillai, minor by his guardian and mother Meenakshi Ammal .. *Appellant** (*1st Deft.*)

v.

Ganesamuthukumarasamia Pillai .. *Respondent* (*Plff.*).

Kasia Pillai v. Ganesamuthukumarasamia Pillai.

Easements Act, S 7—Natural right—Rain water collecting on a person's land—Right to drain off into the adjoining land lower down—Customary right—Right to drain off water brought for ordinary agricultural operations—Right to open vents in the bund put up along the boundary—When exercisable

An owner of a piece of land has a natural right to drain off the rain water that collects on his land into the adjoining lands belonging to another lower down.

In India the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations is a customary right and not a natural right.

Dictum of Sadasiva Aiyar, J, to the contrary in *Doraiswami Muttiriyan* v. *Nambiyappa Muttiriyan*, (1918) M.W.N. 167 not approved.

The owner can exercise this right to drain off the water that collects on his land or that is brought into his land, by opening vents in the bund which he has put up along the boundary between his land and the adjoining land lower down, so long as no damage is caused to the owner of the adjoining land.

Appeal against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in A.S. No. 197 of 1924 (A.S. No. 191 of 1924 on the file of the District Court of Tinnevelly) preferred against the decree of the Court of the

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*S.A. No. 1452 of 1925. 23rd November, 1928.

Kasia Pillai v. Ganesamuthukumarasamia Pillai.

Madhavan Nair, J.

Principal District Munsif of Tinnevelly in O.S. No. 344 of 1921.

B. Sitarama Rao and *T. Nallasivam Pillai* for appellant.

K. S. Sankara Aiyar for respondent.

The judgment of the Court was delivered by

Madhavan Nair, J.—The 1st defendant is the appellant. The plaintiff and the 1st defendant are owners of adjoining lands. The plaintiff's lands lie on the north and the 1st defendant's lands which are on a higher level lie on the south. Along the boundary between their respective lands the 1st defendant put up a bund three feet high and in two particular places in this bund he cut openings for allowing the surplus water collecting on his lands to flow into the plaintiff's lands and thence into the Palayam channel, which lies to the north of the plaintiff's lands. It is the common case of both parties that the plaintiff's land was part of the Palayam channel until it was granted to the plaintiff in about 1905 by the Government. It has been found by the Courts below that the bund stands on the 1st defendant's lands and was put up by him, though the plaintiff alleged that it belonged jointly to the 1st defendant and himself. The case of the plaintiff is that the 1st defendant is not entitled to drain off the surplus waters of his lands into the plaintiff's lands on the north and that, in any event, he is not entitled to let them off through particular openings in the bund. He therefore instituted the suit out of which this second appeal arises for a declaration that the 1st defendant is not entitled to let off the waters of his lands into the plaintiff's lands and for necessary injunctions for giving effect to that declaration. He also claimed damages of Rs. 200 alleged to have been sustained by him on account of the 1st defendant allowing water to flow through his lands. It may be stated here that the waters which collected on the 1st defendant's lands consisted not only of the rain water but also of the water which he was entitled to bring into his lands for cultivation purposes from the Palayam channel.

The District Munsif dismissed the plaintiff's suit holding that the 1st defendant has a natural right to drain off the waters of his fields into the plaintiff's fields lower down under section 7 of the Easements Act and that he could do this by making openings in the bund as he had been doing so for over 60 years. On appeal the Subordinate Judge held that the 1st defendant had a natural right to drain off into the lower lands of the

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plaintiff the rain water as well as the water coming into his lands by ordinary agricultural operations, but he held that he had no right to let these waters into the plaintiff's lands through particular vents in the bund as according to his findings he had not established an easement right for doing so by 60 years' user against the Government. He therefore gave a decree for the plaintiff to the following effect:

"The 1st defendant will be declared entitled, as a matter of natural right, to drain the surplus waters collecting on his land into plaintiff's lands as they would be according to the natural situation of the fields without any bunds and not by putting up any bund or opening vents into it and an injunction will issue restraining defendants, etc., from letting the waters of the southern fields into plaintiff's land on the north through the vents."

The plaintiff's claim as regards damages was dismissed by both the Lower Courts.

In Second Appeal Mr. Sitarama Rao contends that the Subordinate Judge declaring the 1st defendant's right to drain off into the plaintiff's fields both the surplus and the artificial waters brought by agricultural operations should have held that he is entitled to do so by opening vents in the bunds so long as no damage is caused to the plaintiff by this procedure. The respondent argues that the appellant is entitled to let off only the natural water and not the artificial water and that this right which he has cannot be exercised by letting the water by opening vents in the bund. Section 7, illustration (1) of the Easements Act states clearly that every owner of upper land has got a natural right that the water rising in, or falling on, such land and not passing in defined channels shall be allowed by the owner of the lower land to run naturally thereto. There can, therefore, be no doubt of the appellant's right to drain off the rain water that collects on his lands into the respondent's lands. (See *Beard* v. *Moria Colliery Co., Ltd.,*[1] *Gibbons* v. *Lenfesty,*[2] *Sheik Hussain Sahib* v. *Subbayya*[3] and *Ramakrishnan* v. *Venkata.*[4] The learned Subordinate Judge says that this natural right has been also held to apply to water coming on the upper land by ordinary agricultural operations. Except the dictum of Sadasiva Aiyar, J., in *Doraiswami Muttirian* v. *Nambiappa Muttirian*[5] no authority has been quoted in support of this proposition. Phillips, J., the other member of the Bench, who heard that case did not think it necessary to express a definite opinion as to the nature or the extent of the natural rights, and

1 84 L. J. Ch. 158. 2. (1915) 113 L.T. 55.
3. (1925) I.L.R. 49 M. 441: 50 M.L.J. 377 (F.B.).
4. A.I.R. 1928 Mad. 52. 5. (1918) M.W.N. 167.

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the learned Judges ultimately decided the case after calling for a finding on the question whether the plaintiff is, by custom or by prescription, entitled to drain into the lower fields the water brought into his land for purposes of irrigation. It appears to us that in India the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations is a customary right. He is entitled to do so by custom; otherwise, it will be impossible to carry on agricultural operations successfully. In this case it is not denied by the plaintiff that the appellant has such a customary right; but what he says is that the water of the appellant's lands is being drained away by a different channel. This is what he states in his plaint:

> "The water of the defendant's lands is being drained into the *odai* in the east and the nanja fields in the west, but, contrary to the said custom, the 1st defendant made an opening in the bund at the place marked *A* in September 1919 and discharged into the plaintiff's fields the water which he collected on his own fields and thereby damaged the crops." (*See* the extract from the pleadings given in the District Munsif's judgment)

It has not been proved that the water of the 1st defendant's land was being drained in the manner alleged by the plaintiff. On the other hand, from the natural situation of the lands of the plaintiffs and the 1st defendant it would appear that the only direction in which the surplus waters collecting on the appellant's land could drain is the northern direction, *i.e.*, into the plaintiff's lands (*see* the Commissioner's Report). It is also clear from the facts of the case that, before the respondent obtained on dharkast the bed of the Palayam channel, the appellant would have been draining his waters into the Palayam channel itself, as his fields then adjoined the channel. In these circumstances we have no doubt that the appellant is entitled by custom to discharge into the respondent's lands the water coming into his land for ordinary agricultural operations and he has a natural right to discharge the surplus rain water also into the plaintiff's lands. He can exercise this right by opening vents in his bund so long as no damage is caused to the plaintiff. The finding that no damage has been caused has been challenged by the respondent in the memorandum of objections filed by him; but this, being a finding of fact, cannot be questioned in Second Appeal.

In view of the facts of the case, no question has been raised with regard to the 1st defendant's right to put up the bund.

In the result, we reverse the decree of the Lower Appellate Court and restore that of the District Munsif with costs here and in the Court below.

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Memorandum of Objections.—The memo. of objections is dismissed with costs.

N.S. *Appeal allowed and memo. dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Kunhanna Rai (died) and another .. *Appellants** (*Respts.*)

v.

Manakke and others .. *Respondents* (*Applts.*).

Kunhanna Rai v. Manakke.

Civil Procedure Code (*V of* 1908), *O.* 41, *R.* 20—*Second Appeal—Similarity of names of two of the parties—Letters Patent Appeal against the decision of second appeal—Name of one of these two parties left out due to* bona fide *mistake—Power of High Court to add this name as a party*

Where, owing to a *bona fide* mistake, on the part of either the clerk or the person who instructed the vakil, caused by a similarity of names of two persons who were parties to a second appeal, the name of one of these persons was left out in the Letters Patent Appeal filed against the decision in the second appeal,

Held, that the High Court had power to correct the mistake and have the appeal memorandum amended by inserting the proper name and bringing on record the proper party.

Chokalingam Chetty v. *Seethai Achy,* (1927) I.L.R. 6 Rang. 29: 55 I.A. 7: 54 M.L.J. 88 (P.C.) distinguished

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Krishnan, dated the 13th day of February, 1924 and passed in S.A. No. 369 of 1921 (A.S. No. 355 of 1919 on the file of the District Court, South Kanara, O.S. No. 7 of 1917 on the file of the Court of the Subordinate Judge of South Kanara).

Advocate-General and *K. Sundara Rao* for appellants.

B. Sitarama Rao and *K. Y. Adiga* for respondents.

The judgment of the Court was delivered by

Devadoss, J.

Devadoss, J.—The plaintiff's branch of the Bellipadi family brought a suit for a declaration that certain properties belonged to the branch and for an injunction restraining the 1st defendant the ejman of the family, from interfereing with their possession. Both the Lower Courts dismissed the suit and on Second Appeal Mr. Justice Krishnan gave a decree to the plaintiffs as regards the house in which the plaintiff's branch is living and

*L.P.A. No. 76 of 1924. 6th December, 1928.

Kunhanna Rai v. Manakke.

Devadoss, J.

the home farm lands which were in the possession of the branch. Against the decree in the second appeal, this Letters Patent Appeal is preferred. A preliminary objection was taken to the maintainability of this appeal on the ground that the 2nd plaintiff was not made a party to it. This came on before us about three years ago and we allowed the appellants to file an application for bringing on record the 2nd plaintiff as a respondent. The application was filed on 15th December, 1925 and we ordered notice on 16th December, 1925. After several adjournments it was ordered to be posted along with the L.P.A. by Jackson, J., on 2nd August, 1926. Mr. Sitarama Rao who appears for the respondents strongly objects to the 2nd plaintiff being made a party to the L.P.A. and he relies upon a recent decision of the Privy Council in *Chockalingam Chetti* v. *Seethai Achy*.[1] In that case, their Lordships hold that the Court had no power to make a person a party who was not made a party to the appeal by the appellant, although he was a party to the proceedings in the Court below. In that case, the parties ought to be brought on the record in appeal was left only by the appellant. It is only when he discovered that he would suffer by reason of that person not being made a party, he applied to the Court for his being made a party. The facts here are different. In this case, owing to an oversight of either the clerk or the person who instructed the vakil who filed the L P. Appeal, the name of the 2nd plaintiff who was the 14th respondent in the Second Appeal was left out. And there is a reason for his name being left out, because it resembled very closely the name of the 3rd defendant. We think in these circumstances, that it was a *bona fide* mistake and this Court has power to correct a mistake and to have the appeal memorandum amended by inserting the proper name and bringing on record the proper party. We do not think that the decision of their Lordships of the Privy Council in *Chockalingam Chetti* v. *Seethai Achy*[1] in any way prevents us from giving relief when we find that owing to a similarity of names a mistake was made in not making a person a party to the appeal. We, therefore, allow the petition as prayed for.

Coming to the merits of the case, to learned Judge (Mr. Justice Krishnan) has evidently owing to an oversight, thought that the Lower Appellate Court found that the home farm land did not become the property of the family by adverse possession. He observes at page 7 of his judgment as follows:

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1. (1927) I.L.R. 6 Rang. 29: 55 I.A. 7: 54 M.L.J. 88.

"As regards the surrounding home farm lands which are cultivated by the members of the Surya Branch, his finding as regards adverse possession will not apply He says so expressly in para 15 of his judgment."

This observation is not strictly accurate, as the District Judge does not say in para. 15 of his judgment that his finding as to adverse possession does not affect the home farm lands. What he says in para. 15 is:

"So my finding with regard to possession only applies to the lands and garden excluding the Surya house which has been always in the occupation of the members of the Surya branch"

His finding is that the house in which the members of the Surya branch lived did not form part of the property of the family. As regards home farm lands, his finding is clear as will be seen from para. 18 of his judgment wherein he says:

"The said family continued in possession and that the said possession is adverse to Surya branch though the manager of the Surya branch was actually collecting rent and carrying on home farm cultivation on behalf of Bellipadi family"

The possession of the home farm lands by the Surya branch was on behalf of the Bellipadi family and therefore the possession was one which would not enure for the benefit of the Surya branch but would only enure for the benefit of the Bellipadi family.

Mr. Sitarama Rao strongly urges that the District Judge found that the possession of the suit properties by the Bellipadi family was traceable to a mortgage. No doubt, the learned District Judge in order to account for the possession of the title-deeds by the plaintiffs suggested that the arrangement might be a mortgage. But when he came to record a finding, he distinctly found that the possession of the suit properties was adverse to the Surya branch. It is urged by Mr. Sitarama Rao that inasmuch as the District Judge found that the title did not pass by sale or by the arrangement of 1872, it must be held that he did not find title by adverse possession in the 1st defendant. We are unable to accept this contention. What the District Judge meant was, that no title by sale was made out and after saying that he went on to consider whether title was acquired by the 1st defendant's family by adverse possession. He considers that point in paragraph 13 and the following paragraphs. On pages 12 and 13, he refers to the various admissions by the plaintiffs as to the home farm lands being the property of the family. Seeing that there is evidence to support the finding of the learned District Judge that the home farm lands became the property of the family by adverse possession,

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we cannot interfere with his finding. In the result, the decree of the learned Judge will be modified by omitting the home farm lands from it. As regards the house, the title of the Surya branch to the house in which it lives is not seriously distributed. The decree of the learned Judge will stand only as regards the house. This disposes of the appeal as well as the Memorandum of Objections.

The parties will pay and receive proportionate costs throughout.

N.S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Tirumala Chetty Rangayya Chetty .. *Applt.** (*Plff.*)

v.

Kandalla Srinivasa Raghavacharlu and others .. *Respdts.* (*Defdts.*).

Tirumala Chetty v. Srinivasa Raghavacharlu.

Mortgage—Subsequent agreement between mortgagor and mortgagee as part of the same transaction—Provision for sale of the mortgaged property to the mortgagee only—Provision for payment of additional interest in case of breach—Construction—Tie on the property—Validity—Agreement to sell at concession rate—If void for indefiniteness—Clause of pre-emption in mortgage—Validity—Rule against perpetuities.

Six days after the execution of a mortgage for Rs 14,000 providing for payment of interest at the rate of 11 annas per cent. per mensem at the end of every year and the re-payment of the principal on a specific date after seven years, and as part of the same transaction, the mortgagor executed a document to the mortgagee the material portion of which was as follows: "As you have advanced this amount as loan at a concession rate of 11 annas per cent. per mensem and suffered a loss of Rs. 500 per annum which would be got if advanced to others for interest at the rate of 12 per cent. per annum, in consideration of the same we shall sell *patteda*, etc, to you only at a concession rate. In case we happen to sell the same, we will not sell the same to others. In case we sell it so, it will not become valid. If we are to act contrary to the same, not only we shall pay interest calculated at the rate of 5 annas per cent. per mensem for the said amount of Rs. 14,000 along with the 11 annas interest mentioned in the document from the date of the document but also we shall pay the costs incurred by you"

Held, that the words "along with" really meant "in addition to" and that the clause providing for the additional interest of 5 annas in addition to the original interest applied not only to the instalments of unpaid interest but also to the amount of interest already paid and received, and that the covenant compelling the mortgagor to sell to the mortgagee only had nothing to do either with the date fixed for the payment or with the date of redemption which might be either subsequent to the date fixed for

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*Appeal No. 292 of 1923. 18th September, 1928.

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payment or before it and therefore would be a tie on the property even after redemption and such a tie would make the whole agreement invalid ;

(2) that, even otherwise, the agreement to sell at a concession rate which was neither ascertained nor ascertainable was indefinite and therefore void , and

(3) that the clause in question was not a clause of pre-emption.

Semble—A contract of pre-emption in a mortgage is a contract for purchase of property though it is contingent upon the mortgagor making up his mind to sell and therefore is not valid

Quaere—Whether the clause in question offends the rule against perpetuities.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor in O. S. No. 9 of 1921.

A. Krishnaswami Aiyar for appellant.

The Advocate-General (*C. V. Ananthakrishna Aiyar*) for respondents Nos. 3 and 4.

The Court delivered the following

ORDER.—Before we dispose of this appeal, we think it necessary to call for a finding on the following issue:—

"Was plaintiff put in possession of the suit lands by the 1st defendant or under his directions, and if so, when?"

Fresh evidence will be allowed. We may add that the plaintiff has filed a statement before us in which he stated his case as to possession and also produced three letters with it. These will be taken into consideration by the Subordinate Judge subject to proof of the letters. Time allowed for submission of the findings will be six weeks from the date of receipt of records in the Lower Court and ten days will be allowed for filing objections.

In compliance with the order contained in the above order the Subordinate Judge of Chittoor submitted the following

FINDING.—The issue that has been remitted to this Court for a finding is as follows:—

"Was the plaintiff put in possession of the suit lands by the 1st defendant or under his directions, and if so, when?"

I find accordingly that the plaintiff was not put into possession of the suit lands by the 1st defendant or under his directions and that the possession assumed by him on 6th January, 1921 was not possession given by the 1st defendant or under his directions.

This appeal coming on for final hearing on Monday and Tuesday the 20th and 21st days of August, 1928 after the return of the finding of the lower upon the issue referred by this Court for trial, and the case having stood over for con-

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Ramesam, J.

sideration till 12th September, 1928 and the case having been set down to be spoken to this, the Court delivered the following

JUDGMENT. *Ramesam, J.*—This appeal arises out of a suit for specific performance of an agreement to sell. The agreement was executed by the 1st defendant for himself and as guardian of his younger brother the 2nd defendant. The 3rd defendant was the divided brother of the plaintiff and the two brothers were on bad terms for some time. He obtained a sale-deed from defendants 1 and 2 on the 6th January, 1921 (Exhibit VII). The plaintiff alleges that this sale-deed was obtained with the knowledge of the plaintiff's agreement, which is Exhibit A, dated the 25th December, 1920. Defendants 4 and 5 are the undivided sons of the 3rd defendant. The 3rd defendant died during the pendency of the case in the Court below. The Subordinate Judge of Chittoor dismissed the plaintiff's suit for specific performance but gave him a decree for refund of the advance of Rs. 2,500, which was received by the 1st defendant at the time of the plaintiff's agreement, with interest. The plaintiff appeals.

The 3rd defendant pleaded in his turn that his sale-deed Exhibit VII, was obtained in pursuance of an agreement executed by the 1st defendant in his favour, namely, Exhibit II, dated the 27th June, 1918, and that, as the plaintiff obtained his agreement, Exhibit A, with the knowledge of the 3rd defendant's agreement, he is not entitled to specific performance. Six days prior to Exhibit II, the 1st defendant executed a deed of mortgage in favour of the 3rd defendant for Rs. 14,000 (Exhibit VI, dated the 21st June, 1918). The language of Exhibit II shows, and the Court has also found that Exhibits II and VI are connected and form part of one transaction. The Subordinate Judge says "Exhibit II was executed between the date of the execution of Exhibit VI and the date of its registration. It was clearly the consideration for the low rate of interest provided in Exhibit VI. and the low rate of interest in Exhibit VI was the consideration for it." The appeal was argued before us by the learned advocate for the appellant and the learned Advocate-General for the respondents on the footing that the two documents form part of the same transaction. I shall later on refer to the argument of the respondents based on the fact that they were executed on different dates. In pursuance of Exhibit II, Exhibit VII was obtained by the defendant. The Subordinate Judge also

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finds that Ex. A was obtained by the plaintiff with the knowledge of Ex. II and this finding has not been challenged in appeal.

When the appeal originally came on for hearing before us, an objection was taken by the learned advocate for the respondents that Exhibit A was inadmissible in evidence on account of the recent decision of the Privy Council in *Dayal Singh* v. *Indar Singh*[1]. The appellant attempted to meet this objection by arguing, first, that the point cannot be raised in appeal and secondly, that there was part-performance of the contract by delivery of possession and therefore specific performance can be decreed. We therefore called for a finding on the question whether the plaintiff was put in possession of the suit lands by the 1st defendant or under his direction and, if so, when? A finding has been returned. In the interval, the Indian Legislature has amended the Indian Registration Act by providing that an unregistered agreement for sale even reciting payment of consideration is not inadmissible in evidence and making this provision declaratory of the law and retrospective in its operation. The result of this amendment of the Registration Act is that the objection as to the admissibility of Exhibit A ceased to be of any importance. This was conceded by both sides and the appeal was argued on the footing that Exhibit A is admissible.

The main question argued before us is whether Exhibit II was void and therefore even if plaintiff had notice of it, his knowledge of it does not disentitle him from obtaining specific performance of his agreement, Exhibit A. The main grounds on which the appellant argues that Exhibit II is void are two: (1) that it is indefinite and therefore incapable of specific performance, and (2) it operates as a tie on the property which was the subject of the mortgage and is therefore invalid. For the purpose of considering these two points I set forth the terms of Exhibit II. After describing the properties, it proceeds as follows:

"As you have advanced this amount as loan at a concession rate of 11 annas per cent. per mensem and suffered a loss of Rs. 500 per annum which would be got if advanced to others for interest at the rate of 12 per cent. per annum, in consideration for the same, we shall sell *patteda*, etc., to you only at a concession rate, in case we happen to sell the same. We will not sell the same to others In case we sell it so, it will not become valid. If we are to act contrary to the same, not only we shall pay interest calculated at the rate of 5 annas per cent. per mensem for the said amount of Rs. 14,000 along with the 11 annas interest mentioned in the document

1. (1926) L.R. 53 I.A. 214: 51 M.L.J. 788 (P.C.).

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from the date of the document but also we shall pay the costs also incurred by you."

I may here mention that under the terms of Exhibit VI which was dated the 21st June, 1918, the time fixed for payment of the principal was 30th December, 1925, but interest was payable every year on the 20th June. The respondents contended that the clause providing for the additional interest of 5 annas in addition to the original interest provided for in the mortgage-bond, Exhibit VI, applied only to the instalments of unpaid interest and does not apply to the amount of interest already paid and received. If, for instance, the first year's interest was paid on the 20th June, 1919 and the covenant to sell the properties to the 3rd defendant was broken some time after, the compensation by payment of additional interest of 5 annas does not apply to the first year's interest. But I cannot accept this construction of that clause in the face of the express provision in it for the payment of additional interest on the amount of Rs. 14,000 from the date of the document. It is therefore clear that the words "along with" in the clause really mean "in addition to." The respondents next contended that this clause shows that the earlier clause compelling the 1st and 2nd defendants to sell the property to the 3rd defendant only was intended to be operative only up to the time of redemption of the mortgage and not beyond redemption; and therefore was perfectly valid as a clause of pre-emption, and if the mortgage is redeemed by payment of the debt, the property goes back to the mortgagors without any tie. But I am unable to accept this construction of the agreement to sell. The clause relating to compensation by payment of additional interest does not necessarily show that the earlier clause binding the 1st defendant to sell to the 3rd defendant only was intended to be operative only before redemption. Just as the 1st defendant was bound to pay an additional rate of 5 annas even in respect of the period for which interest has been paid under the terms of the mortgage bond, similarly even where the whole amount of the debt is paid off, it was intended that the 1st defendant should pay an additional compensation of 5 annas if he broke the covenant regarding the sale to the 3rd defendant only. How far such a clause is valid is another matter, but at present I am merely trying to construe the meaning of the two clauses and it seems to me that the meaning of the clause according to the plain intention is not to be modified or cut down with reference to the consideration that the construction according to the plain in-

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tention may render the clauses invalid. I am, therefore, of the opinion that the covenant compelling the 1st defendant to sell to the 3rd defendant only has nothing to do either with the date fixed for payment in Exhibit VI or with the date of redemption which, it seems to me, may be either subsequent to the date fixed for payment or before it, for Exhibit VI, though it prevents the mortgagee from bringing a suit for sale on the covenant to pay before the 30th December, 1925, does not prevent the mortgagor from paying the debt at any time before that date. The mortgagor might redeem the mortgage at any time prior to the 30th December, 1925 or after the 30th December, 1925. If, for instance, the mortgagor redeemed it in 1919, I do not think it can be said that the clause compelling the 1st defendant to sell to the 3rd defendant only was inoperative after such redemption in 1919. Thus, even after redemption if the property returns to the mortgagor's hands, there would be a tie on the property and such a tie would make the whole agreement invalid. It is enough to refer to *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ltd.*[2]

But even accepting the respondents' construction of this clause, it seems to me that the clause is void for more than one reason, namely, that it will still operate as a tie and that it is indefinite. The respondents contend that it is not indefinite and that it is merely a clause of pre-emption and that it would not make it invalid within the meaning of the decisions on this matter. First, it seems to me that the clause is certainly indefinite because, according to it, the 1st defendant was to sell to the 3rd defendant at a concession rate, the Telugu word used being సలీసుగా (*saleesuga*). Now a concession or a favourable rate must be some rate substantially less than the fair rate, the proper rate or the market rate. An agreement to sell at a moderate price or at a fair rate or at a proper rate may be perfectly valid but an agreement to sell at a favourable or concession rate is indefinite and must be regarded as void for indefiniteness. In this respect, the present case is worse than the clause in *Bromley* v. *Jefferies*,[3] where the agreement was to sell for £1,500 less than what any one else would pay and the clause was held to be indefinite. The respondents argue that the word సలీసుగా (*saleesuga*) is merely an expletive and may be ignored and we ought to construe the clause to be merely a covenant to sell at a proper rate, but I am unable to accept this contention. The object of this clause is to compel the 1st defendant to sell

2. (1904) A.C. 323.

3. (1700) 2 Vern. 415; 23 E.R. 867.

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at a substantial deduction from the fair value, that is at a rate which is not the proper rate, and the contention requires me to construe the clause as the opposite of what it is. I am, therefore, unable to accept it The advocate for the respondents also tried to argue that the clause is not indefinite because the concession expected is fairly ascertainable, for, according to him, the amount of concession is equivalent to the amount of compensation provided for by the second clause, naemly, the additional interest of five annas. Here again, I am unable to accept this argument. The clause providing for compensation in case of breach of covenant to sell cannot throw light strictly on what the amount of concession should be. To say that the amount of concession should be exactly equivalent to the amount of compensation is to speculate on the intention of the parties and add to the terms of the document. All that the document does is that it mentions the fact of advancing the loan at 11 annas as the motive or reason for the covenant to sell but the covenant itself does not mention any definite rate and we cannot add to it. So I am not able to accept both branches of this argument for the respondents.

Even assuming that the words "concession rate" may be taken to be equivalent to a "proper rate" and also assuming that the covenant is intended to operate within the time of redemption and, by reason of these two assumptions in favour of the respondents, the clause is no more than the ordinary clause of pre-emption, it is doubtful whether the clause is valid. The respondents rely on a passage in Coote on Mortgages, 9th ed., p. 23. We find that the expression of opinion relating to pre-emption was repeated from earlier editions and the editors of the later editions did not think fit to modify it even after the decisions in *Noakes & Co.* v. *Rice*,[4] in *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ltd.*[2] and in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Ltd.*[5] The expression of opinion is based on two decisions mentioned in the foot-note. These are *Orby* v. *Trigg*,[6] and *In re Edwards' Estate.*[7] Then the foot-note runs: "See *Dawson* v. *Dawson*,[8] *Cookson* v. *Cookson*[9] and see also *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Ltd.*[5]" In *Orby* v. *Trigg*[6] it was held that the covenant was not known to the mortgagor or to the mortgagee and a decree for redemption

2. (1904) A.C. 323.
4 (1902) A.C. 24
5 (1914) A.C 25 at 37
6. (1722) 9 Mod 2: 88 E.R. 276.
7. (1861) 11 Ir. Ch. R 367.
8. (1837) 8 Sim. 346: 59 E.R. 137.
9. (1837) 8 Sim. 529: 59 E.R. 210.

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was given to the purchaser free of the clause of pre-emption. It is not therefore a decision on the point, though it suggests that if the clause was known it might have been binding. The Irish Chancery case is not available. In *Dawson* v. *Dawson*[8] there was an option to purchase in favour of a son in the devise by the father. As the son did not exercise it within the time, it was held that he could not enforce it afterwards. In *Cookson* v. *Cookson*[9] there was a clause of pre-emption in a partnership deed. It was held that it expired with the term mentioned in it and could not be exercised afterwards. In *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Ltd.*[5] the reference was only to the general principles and not to a caes of pre-emption. In my opinion, therefore, the opinion in Coote on Mortgages is not supported by the cases cited. On the other hand, there are the observations of Lord Macnaghten at page 326 of *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ltd.*[2]:

> "But in my opinion the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property,"

and the observations of Lord Parker of Waddington in *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Ltd.*[5]:

> "The rule referred to in some of the authorities to the effect that a mortgagee cannot as a term of the mortgage enter into a contract to purchase, or stipulate for an option to purchase, any part of or interest in the mortgaged premises"

A contract for pre-emption, though not a case of absolute option—for unless a mortgagor makes up his mind to sell, the right of pre-emption does not arise—is still a contract for purchase of property though it is contingent upon the mortgagor making up his mind to sell. It is like any other contract and when the contingency happens, is capable of specific performance even against a person who purchases with notice of it. It is therefore like any other contract of purchase and I think falls under the phrase "contract to purchase" in the dictum of Lord Parker quoted above. In *Davis* v. *Chamberlain*[10] there was a clause giving the vendor the option of finding one-third the capital of a company which was to be floated for the purpose of developing land. The company was formed but the option was not given. It was held that, if the clause was contained in a mortgage, it would not have been binding but as it was part of the

2 (1904) A C 323 5 (1914) A C. 25 at 37, 50.
8. (1837) 8 Sim 346: 59 E R. 137. 9. (1837) 8 Sim 529: 59 E.R. 210.
10. (1909) 26 T.L.R. 138.

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contract to sell, it was found valid and binding. It is therefore doubtful whether even if the clause in question is a clause of pre-emption, it is valid with reference to the authorities cited above. The case *Haris Paik* v. *Jahurudhi Gasi*[11] was long before the above authorities and there is no discussion of any cases and is of no value to the respondents. But I do not think it necessary to express my final opinion on the clause of pre-emption for, as I have already said, I do not think it is a clause of pre-emption. A clause of pre-emption is generally a clause to sell at a price which any one else would give and which would be generally the market rate or proper rate. Here, it is for a favourable or concession rate, that is, something less than what another would give.

It is also contended for the respondents that even if the clause was intended to operate beyond the time of redemption, it is not invalid. They rely on *John Brothers Abergarw Brewery Co.* v. *Holmes*[12] where it was held that the restrictive covenant may be limited to the period of continuance of the mortgage though not binding after redemption. It is doubtful how far this case can be regarded as an authority after the decision of the House of Lords in *Noakes & Co.* v. *Rice.*[4] The case of *In re Cuban Land and Development Company, Ltd.*[13] was also relied on. The decision in that case turned upon the fact that it was a peculiar contract and the case of *Noakes & Co.* v. *Rice*[4] was distinguished thus by Lawrence, J:

"In the first place, it was not a case of debentures or debenture stock issued by a limited company, but of a mortgage between private individuals, etc."

Therefore I do not think that the case helps the respondents. As there is an interval of six days between the mortgage Exhibit VI and the agreement Exhibit II, the respondents also rely on the observations of Lord Halsbury in *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ltd.*[2]:

"If a day had intervened between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced."

But in the case of *Browne* v. *Ryan,*[14] which was approved by the House of Lords in *Noakes & Co.* v. *Rice*[4] and particularly by Lord Halsbury, the mortgage was dated the 16th June, 1898 and the agreement was dated the 21st June and it was found they were parts of one transaction. The true

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2. (1904) A.C. 323 at 325.
4. (1902) A.C. 24.
11. (1897) 2 C.W.N. 575.
12. (1900) 1 Ch. 188
13. (1921) 2 Ch 147.
14. (1901) 2 Ir R. 653.

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view is stated by Viscount Haldane in *G & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Ltd.*[5]:

"The question is in my opinion not whether the two contracts were made at the same moment and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts. . . . The question is one not of form but of substance, and it can be answered in each case only by looking at all the circumstances, and not by mere reliance on some abstract principle, or upon the dicta which have fallen obiter from Judges in other and different cases"

Even Lord Lindley who is supposed to have taken a more favourable view in favour of restrictive covenants on account of his decision in *Santley* v. *Wilde*[15] says at p. 329 in *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ltd.*[2]:

"No contract between the mortgagor and the mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan can be valid, etc."

I therefore think that the observations of Lord Halsbury do not help the respondents.

The appellant also contended that the clause in question was void for a third reason, namely, that it offends the rule of perpetuities and the case of *L. & S. W. Railway Co.* v. *Gomm*[16] and *Maharaj Bahadur Singh* v. *Balchand*[17] were relied on, but it is not necessary to consider this question which has given rise to considerable conflict of opinion in Indian Courts in view of my conclusion on the other grounds on which the validity of the agreement is questioned.

I am therefore of the opinion that the clause in question is void and as such the plaintiff is entitled to ignore it when it came to his knowledge. There is therefore no legal obstruction to the enforcement of his agreement. The plaintiff is therefore entitled to specific performance. The decision of the Subordinate Judge is reversed and the appeal is allowed and a decree will be passed with costs throughout directing the defendants 1, 2, 4 and 5 to execute a conveyance to the plaintiff on the plaintiff depositing the balance of the consideration *minus* interest on Rs. 2,500 at 6 per cent. from 4th January, 1921 to the date of actual deposit by the plaintiff and to deliver possession of the suit lands to the plaintiff and the amount deposited will be allowed to be drawn by defendants 4 and 5.

Reilly, J.

Reilly, J.—Now that Act II of 1927 has made it clear that Exhibit A, though unregistered, is admissible in evidence, the defendants can resist the plaintiff's claim only by showing that

2 (1904) A.C. 323.
5. (1914) A.C. 25 at 39.
15. (1899) 2 Ch. 474
16. (1882) 20 Ch D. 562.
17. (1920) L.R. 48 I.A. 376.

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Exhibit II, the earlier agreement for sale in favour of defendant 3, of which it is not now disputed the plaintiff was aware when he obtained Exhibit A, is valid. For the plaintiff the validity of Exhibit II is attacked on several grounds. The learned Advocate-General at one stage of his arguments, as I understand him, contended that Exhibit II was not part of the same transaction as the mortgage-deed Exhibit VI, which was executed six days earlier. That interval of time alone is not sufficient to show that the two documents represent separate transactions. And, when we examine the wording of the two documents, I think it is impossible to dissociate them. Exhibit II recites that its executants, defendants 1 and 2 and their brother, who were also the executants of the mortgage-deed, Exhibit VI, had at the time of mortgage promised to sell the land now in question to defendant 3, the mortgagee; and by Exhibit II they now agree that, as defendant 3 had advanced the mortgage amount at a concession rate of interest, 11 annas per cent. per mensem instead of Re. 1, which he could have obtained for his money, if they sell the land, they will sell it to him at a concession rate and that, if they break this agreement, they will pay the additional interest of 5 annas per cent. per mensem, which would make up the Re. 1 per mensem. That makes it quite clear, I think, that the two transactions were so interlocked as to form parts of one transaction. We start therefore from the position that as part of the mortgage transaction defendant 3 obtained this agreement to sell, Exhibit II.

If Exhibit II properly construed would bind the mortgagors not only until the redemption of the mortgage but after redemption it is obviously void. If on redemption the mortgagors would not get back the mortgaged property free not only from the mortgage debt but from every obligation which formed part of the mortgage transaction, there would be a clog or fetter on the equity of redemption, which the Court must refuse to recognise. The learned Advocate-General does not dispute that proposition. But he contends that the agreement to sell embodied in Exhibit II does not extend beyond the currency of the mortgage. That I think is against the plain meaning of the document. There are no words in Exhibit II explicitly limiting its effect to the currency of the mortgage. But it is suggested that the expressions used in regard to the payment of the additional interest at the rate of 5 annas per mensem, if the agreement to sell to defendant 3 is broken, show that that was the intention of the parties. It is provided that, if the

agreement to sell is broken, the mortgagors shall pay the additional interest at the rate of 5 annas along with the interest at the rate of 11 annas provided in Exhibit VI. The Telugu words in Exhibit II which have been translated "along with" are *tho kuda*. It is argued that the additional interest cannot be paid along with the original interest after redemption and therefore the stipulation to pay additional interest and with it the agreement to sell cannot have been intended to take effect after redemption. But, if we examine the document a little more closely, it becomes clear that the words *tho kuda* have not been used in this literal sense. According to the document, if the agreement is broken—that is according to the learned Advocate-General's interpretation broken at any time before redemption—the additional interest is to be paid *"tho kuda"* the original interest from the date of the document. But it is obvious that the breach might occur after several payments of interest though before redemption. If that happened, the additional interest would have to be paid from the date of the document but could not be paid literally along with the interest already paid. I do not think that we can give any reasonable effect to the words *tho kuda* in Exhibit II unless we understand them to mean "in addition to," as they often do mean in Telugu documents. Apart from this argument based on the words *tho kuda* I see nothing in Exhibit II which restricts its effect to the currency of the mortgage, and on the ground that Exhibit II would prevent the mortgagors from getting back their property on redemption free from the obligation to sell to defendant 3 in certain circumstances, an obligation which has been found to be part of the mortgage-transaction, the agreement is clearly void.

Apart from this more general view of the matter it is contended for the plaintiff that Exhibit II is invalid because a mortgagee is not permitted as part of his mortgage-transaction to obtain a contract for the sale of the property to him even if that contract is to give him an option to buy only until the mortgage is redeemed. We need not go further than *Samuel v. Jarrah Timber and Wood Paving Corporation, Ltd.*[2] for an authority for that rule. The learned Advocate-General contends that the rule does not apply to a contract for pre-emption where the mortgagor is not bound to sell at the option of the mortgagee, but only to give the mortgagee an opportunity of buying if the mortgagor wishes to sell. *Davis v. Chamberlain*[10] is by implication against that

2. (1904) A.C. 323. 10. (1909) 26 T.L.R. 138.

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contention; and it may be remarked that a mere right of pre-emption may well prove some hindrance to a sale for full value. But I prefer not to express a definite opinion on that question on this occasion as it appears to me unnecessary for this part of the present case. Here we have something more than a contract for pre-emption and to my mind something much more objectionable. This is not a case where the mortgagor, if he happens to want to sell the property, must give the mortgagee an opportunity of buying at the price he can get from any one else. Here, even if we do not take the words "we shall not sell to others" as meaning more than that the mortgagors will not sell to others without first giving the mortgagee his opportunity, that opportunity is, not to buy at the market-price or what can be obtained from others, but at something less, at a "concession" price. Now, if the rule that a mortgagee cannot as part of the mortgage-transaction obtain an option to purchase at the full value is to be maintained, on what principle can he be allowed to obtain as part of the mortgage-transaction a right to tie the mortgagor's hands so as to prevent him from getting the full value from any one? In such a case it is true that the mortgagor cannot be forced to sell at the option of the mortgagee; but, if he wishes to sell at all, he can be forced to sell at less than the full value of the property. To my mind the one is as repugnant to the essence of a mortgage as the other. If by the mortgage-transaction the mortgagor's right to sell the equity of redemption at its full value is cut down, we have at once something more than a mortgage, something repugnant to a mortgage. In *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Ltd.*[5] Lord Parker suggested that one justification for the rule that a mortgagee cannot as part of the mortgage-transaction obtain a contract from the mortgagor to sell the mortgaged property to him is that such a contract is repugnant to the mortgagor's contractual right to obtain a reconveyance on redemption, which is explicit in what in this country we call an English mortgage, and also repugnant to the equitable right to obtain a reconveyance on redemption even after the date for payment has passed. That is an illuminating explanation of the rule. But Lord Parker did not suggest that the rule applies only to what we call English mortgages nor that it is not still in full force in respect of all transactions which are really mortgages. There is no valid reason, so far as I can

5. (1914) A.C. 25.

see—and none has been suggested before us—why the rule should not be fully applicable to a simple mortgage in this country. Apart from all questions of its historical origin or development, the principle behind the rule is that the mortgagor shall not by the mortgage-transaction impair his right to the property or his right to deal with it except so far as it is made security for the mortgage money. That principle is clearly infringed, if by the mortgage-transaction the mortgagor binds himself even for no longer than the currency of the mortgage to sell, if he sells at all, at something less than the full value of the property. For this reason also I think we must find that Exhibit II is invalid.

It is also contended for the plaintiff that Exhibit II is void for uncertainty. It provides that, if the mortgagors sell the property now in question, they will sell it to the mortgagee, defendant 3, "at a concession rate." The learned Advocate-General suggested at one stage that we should read the document as a contract for pre-emption and ignore this expression "concession rate." But the tenor of the document shows that this expression was deliberately introduced; and the explanation of its introduction is set out. It is clear that it is an important term of the document, which we should not be justified in disregarding. Then can we say or ascertain what the parties to the document meant by selling "at a concession rate?" The only things in the document which go any way towards giving precision to this stipulation are the statement that the reduction of interest will cause defendant 3 a loss of Rs. 500 a year and the provision that, if the contract to sell is broken, the executants will pay to defendant 3 additional interest at 5 annas per mensem from the date of the document, which would make up the ordinary interest of Re. 1 per mensem. But Rs. 500 is a round sum, which is less than the annual difference between the two rates of interest, even if the interest were paid punctually as simple interest. And, if either the Rs. 500 a year or the interest actually lost by reduction of rate were intended to fix the amount of "concession" in the sale price, surely the parties would have expressed that definitely as the measure of the "concession" or would at least have provided for a "proportionate concession." Here the document sets out the reason of the concession in price and the compensation to be paid if the agreement is broken, but avoids giving any precision to the word *saleesuga,* though that might so easily have been done. I agree that the "concession" in price in Exhibit II is neither

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ascertained nor ascertainable, and that therefore apart from its other infirmities the agreement is void for uncertainty.

The last contention for the plaintiff is that Exhibit II infringes the rule against perpetuities. I agree that it is unnecessary to discuss this question, which was not argued very fully before us. I will only add that I do not think that the decision of their Lordships of the Privy Council in *Maharaj Bahadur Singh* v. *Balchand*,[17] on which the plaintiff relied, is of very great assistance to us in this connection, as that case did not deal with an agreement for sale of land, in respect of which in this country we have the special provision in section 54 of the Transfer of Property Act.

On account of the three contentions of the plaintiff, which I think must be upheld, I agree that this appeal must be allowed and a decree made for the plaintiff with costs in both Courts in the terms proposed by my learned brother.

N.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE THIRUVENKATACHARIAR.

Raja Ramaswami (dead) and others .. *Appellants* (3rd Deft. and his L.Rs.)*

v.

Govindammal and others .. *Respondents (Plff, 5th and 1st Defts.).*

Raja Ramaswami v. Govindammal.

Limitation Act (IX of 1908), Arts 44, 123, 126, 136, 140 and 144—Applicability—Will giving life-interest to father and remainder to his minor son absolutely—Alienation by father of minor son's interest in property given by will—Suit by son to set aside and to recover property—Limitation—Applicability of Art. 44 to the case—Purchaser from ward—Suit by—Art 44 if applicable to—Suits for possession—Article if and when applicable to—Age of person—Evidence—Sale-deed by his deceased parents—Statement as to age in—Admissibility.

A Hindu, who had a son (*R*), a grandson (1st defendant) by that son, and a widowed daughter and two grandchildren by her, executed a will in respect of his properties which among others comprised the suit house and ground As regards the suit house, the will gave to *R* a life estate therein without power of alienation, and the remainder absolutely to the grandson (1st defendant) with full powers of alienation A monthly allowance was also directed to be paid to the daughter and her children out of the income of the suit property until the happening of a certain event.

After the death of the testator, the suit house was sold to the 2nd defendant under a deed of sale executed by (1) *R* for himself and as father

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*C.C. Court Appeal No. 25 of 1926. 1st November, 1928.

17. (1920) L.R. 48 I.A. 376.

and guardian of the 1st defendant, then a minor, (2) *R's* wife and mother of the 1st defendant, and (3) the testator's daughter for herself and as guardian of her minor children. *R* died eight years after the execution of that deed of sale; and nearly 10 years thereafter the 1st defendant sold the suit house to the plaintiff. About a year after her purchase, the plaintiff sued, *inter alia,* the 1st defendant, the 2nd defendant, and his son the 3rd defendant, for recovery of possession of the suit house which had been in the possession of the 2nd defendant's family from the date of his purchase thereof. The suit was instituted more than three years after the 1st defendant had attained his majority but within 12 years of the date of the death of *R.*

Held. (1) that the onus was on the plaintiff to prove when her vendor attained majority; and (2) that Art. 44 of the Limitation Act applied to the case, and not Art. 123 or 136 or 140 or 144 and that the suit was barred.

On an issue as to the age of a person, *held,* that the statement as to his age in a sale-deed executed by both his deceased parents at a time when they had no interest to misstate his age was admissible in evidence.

Appeal against the decree of the City Civil Court, Madras, dated 23rd December, 1925, in O.S. No. 641 of 1924.

M. S. Venkatarama Aiyar and *K. Aravamuda Aiyangar* for appellants.

K. Ramanatha Shenai and *K. Sanjeeva Kamath* for respondents.

The judgment of the Court was delivered by

Thiruvenkatachariar, J.

Thiruvenkatachariar, J.—This is an appeal preferred by the 3rd defendant in O. S. No. 641 of 1924 on the file of the City Civil Court. By the decree passed in that suit the appellant is directed to deliver up to the plaintiff, who is the 1st respondent in this appeal, possession of the suit property and also pay him the mesne profits as ascertained therein and also his costs of the suit. The 5th defendant in the suit is impleaded as the 2nd respondent in this appeal.

The material facts of the case as to which there is now no dispute are as follows:

The suit property which is a house and ground in Old Washermanpet belonged to one Venkatarama Chetti. He died on 6th September, 1904, leaving him surviving a son named Rangan Chetti, a grandson by that son named Krishnappa Chetti and also a widowed daughter and two grandchildren by her. On 22nd July, 1904, he executed a will in respect of his properties which among others comprised the suit property. As regards the suit property, the provisions of the will gave to the son Rangan Chetti a life estate therein without power of alienation and the remainder absolutely to the grandson Krishnappa Chetti with full powers of alienation. An allowance of Rs. 6 per month was also directed to be paid to the daughter

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and her children out of the income of the suit property until she got possession of her husband's estate. *See* Ex. A.

On 6th February, 1905, the suit property was conveyed by a deed of sale to the 2nd defendant Gurunatha Mudaliar and his father Raju Mudaliar by the following persons, namely (1) Rangan Chetti for himself and as father and guardian of his minor son Krishnappa Chetti, (2) Rangan Chetti's wife, Angammal, and (3) Venkatarama Chetti's daughter whose name is herein given as Peddiammal acting for herself and as guardian of her two minor children. The sale-deed recites the receipt by the vendors of the consideration of Rs. 800 for which the property was sold and the delivery of possession of the property to the purchasers. Since then the suit property has all along been in the possession of the 2nd defendant's family. The 3rd defendant is the son of the 2nd defendant and by some family arrangement, which it is unnecessary to refer to, the suit property was in his possession and enjoyment at the date of the suit, a portion thereof having been let by him to the 4th defendant.

Rangan Chetti died on 25th October, 1913. On the 7th March, 1923, his son Krishnappa Chetti, the 1st defendant in the suit, executed a sale-deed for the suit property in favour of the plaintiff Govindammal, for Rs. 1,500. The plaintiff has thereafter filed this suit on 1st December, 1924, for recovery of possession of the property with mesne profits from defendants 2 to 4. Her case is that the sale of 6th February, 1905 to the 2nd defendant and his father was invalid as against the 1st defendant; it was not made for any purpose binding on the 1st defendant who was then a minor; and his father Rangan Chetti had no power under the will to dispose of the property in any manner. The plaintiff is therefore entitled to possession of the property with mesne profits from the date of the sale to her. In the alternative, the plaintiff prays that if the Court should hold that the plaintiff is not entitled to a decree for possession of the property, she should be given a decree against the 1st defendant for Rs. 1,500 being the consideration paid by her to him for the sale, with interest thereon from the date of the sale.

The 1st defendant put in a written statement admitting the sale of the suit house and ground by him to the plaintiff for Rs. 1,500 and stating that the sale of the suit property by his father to the 2nd defendant and his father was a collusive

and fraudulent transaction and that it cannot affect his title to the property. The plaintiff in virtue of the sale-deed he (1st defendant) has executed in her favour is entitled to a decree for possession of the property with mesne profits; but even if the Court should hold that she is not entitled to those reliefs she cannot claim the repayment to her by him (1st defendant) of the consideration paid by her for the sale.

The 3rd defendant, who was the contesting defendant in the Lower Court, contended that the suit property did not belong to Venkatarama Chetti through whom the 1st defendant claimed but that it belonged to his wife Krishnammal whose heirs sold the same to the 2nd defendant and his father. He also denied the genuineness of the will of Venkatarama Chetti. He pleaded further that the sale was valid as it was made for discharging certain family debts of the vendors. Lastly he contended that the suit was barred by limitation as from the date of the sale-deed of 6th February, 1905 he and his predecessors-in-title have been in continuous possession of the property as the owners thereof.

The genuineness of the will is not open to question as the 1st defendant obtained Letters of Administration for Venkatarama Chetti's estate with the will annexed. The plea that the property did not belong to Venkatarama Chetti but to his wife was also given up at the trial and the only questions upon which the parties went to trial and which are necessary to be referred to in this appeal are: (1) Whether the sale of 6th February, 1905 to the 2nd defendant and his father was made for any purpose binding on the 1st defendant, and (2) whether the suit is barred by limitation.

The learned City Civil Judge decided both those questions in plaintiff's favour. His findings are (1) that the sale of the property by the 1st defendant's father to the 2nd defendant and his father was not made for any purpose binding on the 1st defendant; and (2) that the suit is not barred by limitation as it has been filed within twelve years from the date of the 1st defendant's father's death (25th October, 1923) when the 1st defendant's cause of action arose, the suit being governed by Arts. 123 and 136 of the Limitation Act. He finds also that the suit is instituted within three years from the date of the 1st defendant attaining his majority. Upon those findings he gave a decree to the plaintiff against the 3rd defendant for possession of the suit property with mesne profits. Against that decree this appeal has been preferred.

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The main contention urged before us on behalf of the appellant are (1) that the evidence in the case makes out the plea, that the sale was made for a necessary purpose, if not wholly, at any rate to the extent of Rs. 300 which went towards the discharge of a mortgage to which the property was subject at the date of the sale; and (2) that the suit is barred by limitation under Art. 44 of the Limitation Act which is the article which applies to the case.

On the first question, namely, as regards the validity of the sale-deed of 6th February, 1905 in favour of the 2nd defendant and his father we have been referred to the evidence as to the payment of the consideration therefor and as to whether any portion thereof went towards the discharge of any mortgage then subsisting on the property which had been effected by Venkatarama Chetti. We see no reason for holding that the Trial Judge has not correctly appreciated that evidence. We are unable to accept the contention of the respondent's Advocate that no consideration is proved to have been paid for the sale-deed and that in substance it amounts to a gift. It seems to us hardly likely that not only Rangan Chetti against whose character aspersions are made by the plaintiff and the 1st defendant (whether with or without justification) but his wife who was interested in protecting her son's right in the property and was also a legatee under the will and his sister who had an interest in the property on account of the allowance provided for her and her children out of its income would all have joined to execute an absolute conveyance to the 2nd defendant and his father and without the receipt of any consideration therefor would have delivered possession of the property to them and also acquiesced in their enjoyment of the same ever since as the owners thereof. We accept the finding that the sale was made for consideration but that it is not shown that it was made for any purpose binding on the minor to any extent.

On this finding the next question we have to consider is whether the suit is barred by limitation. The learned City Civil Judge considers the question in paragraph 13 of his judgment. He holds that the suit is governed by Arts. 123 and 136 of the Limitation Act, and that their combined effect is to give a period of twelve years for the present suit from the date when the 1st defendant became entitled to possession of the property which was the 27th October, 1913, the date of his father's death. He holds that the suit being instituted within that period is not

barred by limitation. He finds also that when this suit was instituted the 1st defendant was under 21 years of age and that it is therefore within time in any case. (The word plaintiff in this contest is an obvious slip for the 1st defendant). This observation of the learned Judge may be taken to refer to the provisions of sections 6 and 8 and Art. 44 of the Limitation Act. But the learned Advocates on both sides who also appeared in the Lower Court say that the applicability of Art. 44 to the case was not argued at all in the Lower Court and that the observation has therefore reference only to sections 6 and 8 of the Act.

It is contended before us on behalf of the appellant that the article of limitation which has to be applied to this case is Art. 44 and that neither of the articles relied on by the learned Judge nor Art. 140 (suit by a remainderman for possession of immoveable property) nor Art. 144 under which the starting point is the date when the possession of the defendant becomes adverse to the plaintiff apply to the case. Under Art. 44 the suit has to be instituted within three years from the date the ward attains majority. If that article applies to the case, the question as to when the ward (*i.e.*, 1st defendant) attained majority becomes material. On that question the appellant contests the finding of the City Civil Judge and argues that he should have found that the suit was instituted more than three years after the 1st defendant attained majority and that it is therefore barred by limitation.

The respondent's Advocate on the other hand contends that Art. 44 does not apply to the case; he supports the view taken by the Lower Court as to the articles which apply to the case. He relies also on Arts. 126, 140 and 144. As regards the applicability of Art. 44 he further contends that it applies only to a suit by the ward himself and not to a suit by a transferee from the ward; the transferee's case is governed by Art. 136 under which he has twelve years from the date when his vendor became entitled to possession.

There can be no doubt that if Art 44 does not apply to this case, the suit will be within time under any of the other articles which have been referred to as applicable to it, as the starting point of limitation under all those articles from which he has a period of 12 years for the suit is undoubtedly the date when the 1st defendant became entitled to possession, *viz.*, 25th October, 1913. The question we have therefore to consider is whether Art. 44 applies to the case and that involves a consideration of the question of fact as to when the 1st defendant

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attained majority. The onus is on the plaintiff to prove when his vendor attained majority. The evidence adduced by him on this question is considered by the Judge in the first portion of paragraph 13 of his judgment. He therefore refers to two documents, namely, Ex. E, which is an extract from the register of vaccination maintained by the Corporation of Madras for the month of October, 1904, and Ex. F, a horoscope alleged to have been cast in connection with the birth of the 1st defendant. According to the entries in Ex. E, which is said to relate to 1st defendant Krishnappa Chetti, he was one year and six months old in October, 1904. The horoscope Ex. F gives the exact date of his birth as 14th April, 1904. The Judge evidently accepts the horoscope as a reliable document and finds that the 1st defendant was born on the date mentioned in it. On that finding he says that the suit was filed within three years from the date of the 1st defendant attaining majority. The Judge evidently considers that the entry in the horoscope is corroborated by the entry in the vaccination register because according to a rule in this City every new-born child must be vaccinated within six months of its birth. But he overlooks the actual age of the child as given in the said register which is one year and six months in October, 1904, and not six months only as required by the rule. If the entry in the vaccination register which is said to refer to the 1st defendant is to be relied on, it shows that he was born in or about April, 1903, and not in April, 1904, as stated in the horoscope. The horoscope is spoken to by the plaintiff's second witness who says he was all along in possession of it and that he gave it to the 1st defendant evidently to be used in this suit. It is not written in any family book, but it is written on a stray paper. The person who cast the horoscope is not called and the plaintiff's second witness though a casteman of the 1st defendant is not related to him. Moreover as already pointed out the entry in the vaccination register which has also been exhibited by the plaintiff goes a long way to discredit the horoscope. In our opinion the horoscope Ex. F is not a document which has been proved, or on which any reliance can be placed. The only reliable document as to the 1st defendant's age is Ex. I which however has altogether been overlooked by the Judge in considering this question. In that document which is dated 6th February, 1905, the 1st defendant is stated to be two years old. That being a statement made by the 1st defendant's father and mother who were both parties to the document is admissible in proof of his age as both of

them are dead. They had then no interest to misstate his age and we find also that the statement in Ex. I fits in approximately with the entry as to his age in the vaccination register. We are therefore unable to accept as correct the finding of the Lower Court that the suit was filed within three years of the 1st defendant attaining majority. On the other hand we are of opinion that when the suit was filed more than three years had elapsed after 1st defendant attained majority and if Art. 44 applies to the case, we must hold that the suit is barred by limitation.

The next question we have to consider is whether this is a suit by a ward who has attained majority to set aside a transfer of property by his guardian. It is now well settled that this article applies not only to setting aside the transfer of property made by a guardian appointed by a Court or by will but also to suits for setting aside a transfer of property made by a natural guardian. Turning to Ex. I, which is the sale-deed for the suit property, under which the contesting defendants claim, it will be seen that under it the property is conveyed to the purchasers by all the persons who under the will were interested in that property. The vendors under Ex. I are (1) 1st defendant's father who had a life-interest in it; (2) the 1st defendant a minor represented by his father and guardian who was entitled absolutely to the remainder subject to the life estate of his father; and (3) Ettiammal, the daughter of the testator, and her minor children represented by her as their guardian to whom a monthly allowance was payable out of the income of the property until Ettiammal got possession of her deceased husband's estate. The minor's mother Angammal was also a party to the document though she was not given any rights in this property, but was a legatee under the will. It is evident that all those interested in the property and also Angammal who was interested in the minor joined in the conveyance in order to convey the entire interest in the property to the purchasers and that it was their combined rights under the will (Ex. A) which they conveyed to the purchaser. So far as the defendant is concerned, he had then a vested interest in it which was transferable and it was transferred on his behalf by his father and natural guardian.

The respondent's Advocate contended that the 1st defendant's father in making the transfer of his minor son's interest in the property must be regarded as acting in his capacity as father and managing member of the family and in that view Art. 126 will apply to the case. That contention will have force

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if the property dealt with by him was joint ancestral property of himself and his minor son, but the will did not create any joint interest in the property in favour of the 1st defendant and his father but only a distinct and separate interest therein in favour of each of them. The interest of the son though vested was to take effect only from the death of the father. The will further provides that the grandson

"alone (*ie,* the 1st defendant) shall use and enjoy the same with power to gift, mortgage or sell the same and no other person shall be entitled to possession of or have concern in respect of the aforesaid house and ground."

This clause clearly shows that the property devised to the 1st defendant should be regarded as his exclusive property and not as ancestral property coming to him from his grandfather. Art. 126 which applies to suits by a Hindu governed by the Mitakshara to set aside alienations of ancestral property cannot therefore apply to the case. See *Arumugam Pillai* v. *Panayadian Ambalam.*[1]

It is next contended that Art. 44 does not apply to this suit because (1) it is a suit for possession of the property and not merely to set aside the transfer and (2) the suit is brought not by the ward but by his transferee.

As regards the first point it has been well settled by several decisions of their Lordships of the Privy Council that it is not the form of the relief claimed which determines the real character of the suit for the purpose of ascertaining under which article of the Limitation Act the suit falls. Though the relief claimed in the suit is possession of immoveable property, yet if the property sued for is held by the contesting defendant under a sale or other transfer which is not void, but only voidable, and he cannot obtain possession without the transfer being set aside, the suit must be regarded as one brought to set aside the transfer though no relief in those terms is prayed for, but the prayer is only for possession of the property. It has been so held with reference to Art. 12 of the Limitation Act where the defendant is in possession under a sale held in execution of a decree of a Court and also as to Art. 91 where the instrument under which the defendant claims is one which is *prima facie* binding on the plaintiff. The same view was also taken with regard to the article in the old Limitation Act relating to suits brought to set aside an adoption. Their Lordships held in

1. (1920) 40 M.L.J. 475.

Jagadamba Chaodhrani v. *Dakhina Mohun Roy Chaodhri*[2] that even when the plaintiff did not in terms sue to set aside an adoption but only to recover possession of property on his *prima facie* title as reversionary heir he was bound to bring his suit within the time allowed by Art. 129 of Act IX of 1871, provided the defendant was in possession by virtue of an apparent adoption; and the plaintiff was not at liberty to bring his suit within the time allowed to reversionary heirs by Art. 142 of that Act. As regards Art. 12 of the Limitation Act which relates to suits to set aside a sale in execution of a decree of a Civil Court the leading case is *Malkarjun* v. *Narhari*.[3] Their Lordships in that case held that though the suit was brought for redemption of a mortgage of immoveable property for which the period of limitation is 60 years, yet as the defendant the mortgagee had purchased the equity of redemption in a judicial sale which was operative against the plaintiff, though liable to be set aside for due cause, the suit is governed by Art. 12 and must be brought within the period of one year prescribed by that article. At p. 350 after referring to the case in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*[2] as supporting that view their Lordships observe with regard to that case:

> "There was difficulty in the case because the expression 'set aside an adoption' is inaccurate An adoption cannot be set aside though its validity may be impeached and in fact the language was altered in 1877 before the appeal was heard"

Turning to the case before them their Lordships observe with regard to Art. 12:

> "It is obvious that the expression 'set aside a sale' is not attended by any such difficulty because a sale valid until set aside can be legally and literally set aside and anybody who desires relief inconsistent with it may and should pray to set it aside"

In *Fakirappa Limanna* v. *Lumanna Bin Mahadu*,[4] which was also a suit for redemption of a mortgage, Art. 44 was applied following *Malkarjun* v. *Narhari*[3] and the suit dismissed as no suit had been brought to set aside the transfer made to the mortgagee of the equity of redemption by the minor's mother within the period allowed by that article.

The same view was taken with regard to Art. 91 of the Limitation Act of 1877 when the plaintiff sought to recover immoveable property which he had himself transferred under a sale-deed to the defendant on the ground that it had been

2 (1886) I.L.R. 13 C 308· L.R. 13 I.A. 84 (P.C.).
3. (1900) I.L.R. 25 B. 337: L.R. 27 I A. 216· 10 M.L.J. 368 (P.C).
4. (1919) I.L.R. 44 B 742 (F.B).

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obtained from him by fraud and undue influence. Their Lordships held that it was not a suit for possession of immoveable property in the sense to which the limitation of twelve years is applicable. The immoveable property could not be recovered until the deed of sale is set aside and the suit therefore falls within Art. 91, Schedule II of the Limitation Act (Act XV of 1877). See *Janki Kunwar* v. *Ajit Singh*[5] and also *Mohesh Narain Munshi* v. *Taruck Nath Maitra.*[6]

The same view has been taken with regard to Art. 44, with which we are here concerned, by this Court in the following cases: *Madugula Latchiah* v. *Pally Mukkalinga,*[7] *Kandasami* v. *Irusappa,*[8] *Arumugam Pillai* v. *Panayadian Ambalam*[1] and by the Bombay High Court in *Fakirappa Limanna* v. *Lumanna Bin Mahadu,*[4] which has already been referred to. These cases are authority for the position that a sale-deed executed by the guardian of a minor though unauthorised, vests the title to the property in the alienee and the minor has therefore to sue to set it aside. In the language of their Lordships of the Privy Council in *Malkarjun* v. *Narhari*[3] such a transfer is operative against the minor and those claiming under him though liable to be set aside for due cause. These cases also establish that though Art. 44 describes the suit to be brought by the ward as a suit merely to set aside the transfer of his property by his guardian, if the transferee has obtained and is in possession and the ward has therefore to add a prayer for the relief of possession Art. 44 alone still applies to the suit though brought for both the reliefs and that if the suit is not brought within the time allowed by Art. 44, the title of the ward becomes extinguished under section 28 of the Act.

The appellant's Advocate relies also on the observations of their Lordships of the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram.*[9] In that case the minor Chockalinga's mother sold his right of management of a pagoda for a consideration. The sale was made on 17th September, 1868 and from that time the purchaser was in enjoyment of the office and its endowments. The minor attained majority in 1880

1. (1920) 40 M.L J. 475.
3. (1900) I L.R 25 B 337· L R. 27 I A. 216 10 M.L.J. 368 (P C).
4. (1919) I.L.R 44 B 742 (F B).
5. (1887) I L.R. 15 C 58 at 65 and 66. L.R. 14 I.A. 148 (P C)
6 (1892) I L.R. 20 C 487 at 495 L.R. 20 I.A. 30 (P.C).
7 (1907) I.L.R. 30 M. 393· 17 M.L.J. 220
8. (1917) I L.R. 41 M 102 33 M L.J 309.
9. (1899) I.L.R. 23 M. 271 at 279: L.R. 27 I.A. 69 (P.C)

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and brought the suit in August 1892 for recovery of the office and possession of the immoveable properties forming the endowment of the temple. Their Lordships held that the sale by the mother of the office was void and did not give any title to the purchaser which remained in the minor and the possession which was taken by the purchaser was adverse to him. Their Lordships in upholding the plea of limitation raised by the defendant observed as follows:

"Chockalinga attained majority in 1880 and had by Art. 44 of the Act three years for suing to set aside the sale by his guardian. He did not do so and by section 28 of the Limitation Act his right became extinguished. Their Lordships are of opinion that there is no distinction between the office and the property of the endowment The one is attached to the other; but if there is, Art. 144 of the same schedule is applicable to the property. That bars the suit after twelve years' adverse possession."

This case was relied on as supporting the contention that Art. 44 applies even to an alienation by the guardian which is void and under which no title passes to the purchaser. The observations of their Lordships may seem open to that construction. But when the facts of the case are looked at, it will be seen that the purchaser of the office under the void sale held possession thereof and of its endowments adversely to the minor for more than the statutory period prescribed by Art. 144 and their Lordships held that the suit was also barred under that article. Whether Art. 44 applies or not, the minor had three years under section 7 of the Act after he became a major for bringing the suit and as he did not bring the suit within that period his title became extinguished under section 28. In the other cases referred to above, their Lordships clearly lay down that a suit to set aside the sale has to be brought because the purchaser acquires a title under the sale, though it is defeasible at the instance of the plaintiff. In other words, Art. 44 applies to transfers which are voidable and not void. The view taken in these cases must be followed as the point directly arose in them and was the basis of their Lordships' decision, whereas in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[9] the suit was in any view held to be barred—whether under Art. 44 or Art 144. In the present case there is no question of the sale being void. We have already disposed of the contention raised on behalf of the respondent that the transfer under Ex. I was really a gift and was therefore void as one which we cannot accept as correct. We are therefore of opinion that if this suit had been brought by

9. (1899) I.L.R. 23 M. 271: L.R. 27 I.A. 69 (P.C).

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the 1st defendant himself it would be barred under Art. 44 of the Limitation Act.

The next question we have to consider is whether the contention that the Art. 44 does not apply to a suit by a purchaser from the ward and that to a suit by the purchaser the 12 years rule of limitation should be applied is sustainable.

This contention is based on the wording of the first column of this article which is "by a ward who has attained majority to set aside a transfer of property by his guardian."

The expression "by a ward" if construed literally no doubt lends itself to such an interpretation and if that is the correct view to take, a suit by those claiming under the ward for recovery of property transferred by the ward's guardian will be governed by some other article. The contention advanced before us is that a suit by those claiming under the ward either as his legal representative or as his assignee will be governed by the article which will apply to the ward himself for the recovery of the property if Art. 44 is to be excluded; in other words, a suit by those claiming under the ward will so far as the present case is concerned be governed by Art. 140 or 144. Under either of those articles the starting point of limitation is the date when the ward became entitled to possession, *viz*, the 25th October, 1913, from which date the possession of the purchaser under Ex. I became adverse to him. This contention if upheld will save the suit from the bar of limitation. So far as the authorities are concerned the only cases bearing on the question to which we were referred are *Laxmava* v. *Rachappa*,[10] *Fakirappa Limanna* v. *Lumanna Bin Mahadu*[4] and *Hanmant Gurunath* v. *Ramappa Lagamappa*.[11]

In *Laxmava* v. *Rachappa*[10] which was a suit brought by the transferee of the ward after the latter attained majority for possession of property which had been alienated by the ward's natural guardian, it was held that Art. 44 applied to the case and that the suit was barred by limitation under that article. In the next case *Fakirappa Limanna* v. *Lumanna Bin Mahadu*[4] a Hindu minor's mother acting as his natural guardian has sold in 1891. to the mortgagee of the minor's property, the equity of redemption, without necessity. The son attained majority in 1895 and died in 1901 leaving a widow who died in 1908. In 1916, the next reversioner sued to redeem the mortgage. It was held that the suit was barred under

4 (1919) I.L.R. 44 B. 742 (F.B.).
10. (1918) I.L.R. 42 B. 626. 11. (1924) I.L.R. 49 B. 309

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Art. 44 as the son ought to have sued to set aside the alienation within three years after his attaining majority. These two cases are clear authorities for the proposition that so far as Art. 44 is concerned, those claiming under the ward stand in the same position as the ward himself and if he is barred under Art. 44 they are in no better position. Upon the facts of the case in *Laxmava* v. *Rachappa*[10] the suit was brought on the 12th August, 1913 for possession of properties alienated by the ward's natural guardian on the 31st May 1909 and if the respondent's contention is sound and the article of limitation to be applied is Art. 144 the suit by the purchaser would be within time. It is, however, to be observed that in this case the conclusion is not reached by any discussion of the question but rather assumed as obvious. These two cases further show that Art. 44 may often operate to curtail the 12 years period of limitation for the recovery of the property (or the 60 years period for the redemption of a mortgage) which the ward would have if Art. 44 is out of the way. That would be the result in all those cases where the guardian makes the alienation shortly before the ward attains majority and if the ward does not sue within the three years period allowed by Art. 44 from the date of his attaining majority, his right to the property becomes extinguished under section 28 (see *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*,[9] *Malkarjun* v. *Narhari*[3] and *Madugula Latchiah* v. *Pally Mukkalinga*[7]). When that happens he is no longer in a position to convey any right to his purchaser but so long as his right to the property is not extinguished he can transfer it, and if he does so, the transferee will *prima facie* have to sue within the same period as his transferor; but if the 12 years rule is to be applied to the assignee of the ward the result will be that the assignee's suit will be barred where it is instituted after 12 years from the date of the purchaser taking possession of the property, but it will be within time if it is instituted within 12 years from that date. In other words, in some cases the purchaser is barred when the vendor is not, while in other cases he is not barred though his vendor is barred. An interpretation which results in such anomalies cannot be readily accepted as sound. In *Hanmant Gurunath* v. *Ramappa Lagamappa*[11] the learned Judges doubted whether Art. 44 applies

3. (1900) I.L.R. 25 B. 337: L.R. 27 I.A. 216: 10 M.L.J. 368 (P.C.).
7. (1907) I.L.R 30 M 393 at 396: 17 M.L.J 220
9. (1899) I.L.R. 23 M. 271 at 279: L.R. 27 I A 69 (P C.).
10. (1918) I.L.R. 42 B. 626.
11. (1924) I.L.R. 49 B. 309.

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to a suit by a transferee from the ward. On that point they observe as follows:

"It would be difficult to apply this Art. 44 to the case of a transferee from the ward. We are not by any means clear that Art 44 would apply to a suit filed by a transferee from the ward. It is, however, not necessary on the facts of this case to decide the question It is enough to point out the difficulty of applying Art 44 to a simple suit by a transferee from the ward. The article refers to a suit by a ward who has attained majority. Assuming without deciding that Art. 44 would not apply to a suit by a transferee, it does not follow that where the ward joins with the transferee in suing to set aside the sale the ward cannot do so if the suit is brought within three years from the date of his attaining majority."

In that case the ward who had transferred the property was also a co-plaintiff and in the view that he was entitled to sue in order to effectuate his transfer to the other plaintiff by securing to him possession of the property, the learned Judges held that the suit must be treated as one rightly brought by the ward and was therefore within time and that in such a suit a decree may be given to the transferee. In this case if Art. 44 did not apply the suit would be barred under the 12 years rule though brought within 3 years from the date of the minor attaining majority, as the provisions of sections 6 and 8 by which an extended period of limitation is given to a minor or other person under disability have been held to be in the nature of privileges or exemptions to which the person under disability alone is entitled, but not a transferee from him or even his legal representative unless the person under disability dies while the disability still lasts. But sections 6 and 8 of the Limitation Act do not apply to suits under Art. 44 as under that article the time from which the period of limitation is to be reckoned begins only after the minority has ceased; and this is also pointed out by the learned Judges in *Hanmant Gurunath* v. *Ramappa Lagamappa.*[11] If the policy of the legislature as appears from sections 6 and 8 be to give to a minor some concessions which are only personal to himself and which an assignee from him is not entitled to it, can hardly be inferred that as regards Art. 44 the transferee may be in a better position than his transferor. If that is not the correct view a ward who for any reason is unable to institute a suit within the 3 years, may get rid of the operation of Art. 44, which will extinguish his title by simply transferring his rights to some other person. To take another case, if the ward dies soon after he attains majority but more than 12 years after the date from which time

11. (1924) I.L.R. 49 B. 309.

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begins to run, his legal representatives will be barred if Art. 44 does not apply to them as they will not have the benefit of subsection (3) of section 6 as the minor died after his disability had ceased. A construction which leads to such anomalous results can hardly be accepted as satisfactory. In our opinion *Laxmava* v. *Rachappa*[10] takes the right view. It proceeds on the principle that a person who claims under another whether as his legal representative or as assignee should in such character be governed by the same rule as would apply to the person from whom he derives his claim, the only limitation being that he is not entitled to any privileges or exemptions which the latter had. This principle is recognised in the Limitation Act itself in the definition of "appellant," "plaintiff" and "defendant" and though the word "plaintiff" does not occur in this article as it does in some others, the plaintiff in a suit under Art. 44 must on principle be held to be in the same position as the ward under whom he claims. We may also in this connection refer to section 146 of the Civil Procedure Code as recognising the same principle. It says:

> "Save as otherwise provided by this Code or any other law for the time being in force where any proceeding may be taken and application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him."

We may also point out that there are other articles in the schedule besides Art. 44 as to which also a literal reading thereof may lead to the same doubt, *viz.*, whether they apply to persons claiming under the person specified in the article. We may first refer to Art. 136 which relates to a suit by a purchaser of immoveable property for possession thereof. Can it with any reason be contended that the article does not apply to those claiming under the purchaser? Turning to the 3rd column of that article, a literal interpretation thereof will make the period of limitation under that article run from the date when the immediate vendor to the plaintiff became entitled to possession. That would clearly be an erroneous interpretation. In *Abbas Dhali* v. *Masabdi Karikar*[11] it has been held that where there have been transfers by successive vendors all out of possession the term "vendor" includes the first in the series of vendors entitled to sue for possession; or take Art. 140, "suit by a remainderman or devisee for possession of immoveable property"; obviously it should apply also to those claiming under him whether as his legal representatives or as assignees. In these

10. (1918) I.L.R. 42 B 626. 12 (1914) 24 I.C. 216.

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articles the word "plaintiff" does not occur in the 1st column; or the word "defendant" in the 3rd column. We have considered this question at some length on account of the doubt expressed by the learned Judges of the Bombay High Court in *Hanmant Gurunath* v. *Ramappa Lagamappa.*[11] So far as the suit by the legal representatives of the ward is concerned it may be that if the ward dies during his minority Art. 44 will not apply to a suit by his legal representative for recovering the property alienated by the guardian whereas if the ward dies after the attainment of majority Art. 44 will apply. But that result follows from the express provisions contained in the Act itself, though it may be that there is no fresh cause of action for the ward on his attaining majority. The principle of Art. 44 seems to be that when the ward attains majority he should if he desires to avoid the alienation made by his guardian bring his suit within the time limited under that article irrespective of the period which he had otherwise.

As regards the ward's assignees however the only article which could be applied is Art. 44 as it is only after the ward becomes a major, he acquires the capacity to make the transfer and any transfer made by him during his minority is under the law void. There need be therefore less hesitation in applying Art. 44 to the assignee from the ward. Moreover the ward himself is also a party to the present suit and though he is impleaded as a defendant he is substantially a co-plaintiff as it is his right which the plaintiff seeks to enforce and it is a mere matter of form that he is not also a co-plaintiff as in *Hanmant Gurunath* v. *Ramappa Lagamappa.*[11]

We are therefore of opinion that Art. 44 applies to this case and the suit not having been instituted within 3 years from the date of the 1st defendant attaining majority we have to hold that it is barred under Art. 44 and on that ground the suit must be dismissed as against defendants 2 to 5.

The respondent's advocate contended that in such an event he is entitled to the alternative relief claimed by him, *i.e.,* to a decree against the 1st defendant for the refund of Rs. 1,500 with interest. The 1st defendant was originally not made a party to this appeal but subsequently upon the application of the respondent he was brought on the record. When the appeal came on for hearing subsequently he did not appear. We find that in his written statement he admits the sale to the plaintiff

11 (1924) I.L.R. 49 B. 309.

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Thiruvenkatachariar, J.

and the receipt by him from the plaintiff of the consideration therefor, *viz.*, Rs. 1,500, but at the same time he denies the plaintiff's right to claim a refund of that amount from him in any event. An issue was framed in the suit with regard to this alternative relief but in the view taken by the Lower Court this question did not arise. But in the view we take, the trial of that issue becomes necessary and for that purpose the case will go back to the Lower Court. In the result we reverse the decree of the Lower Court and dismiss the suit as against defendants 2 to 5.

As regards costs we find that the contesting defendants 3 to 5 denied the genuineness of the will of Venkatarama Chetti and also set up that the suit property belonged to Krishnammal and not to Venkatarama Chetti a defence which they abandoned in that Court itself and they did not also contend that Art. 44 applies to the case. For these reasons we allow to the contesting defendants their costs of this appeal only and direct them to bear their own costs in the Lower Court. The case will be remitted to the Lower Court for the trial of the alternative case put forward against the 1st defendant.

A.S.V. *Case remanded.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Straits Settlements (Settlement of Singapore).]

PRESENT :—THE LORD CHANCELLOR, VISCOUNT SUMNER AND LORD ATKIN.

Inche Noriah binte Mohamed Tahir .. *Appellant**

v.

Shaik Allie bin Omar bin Abdullah Bahashuan .. *Respondent.*

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Inche Noriah v. Shaik Allie bin Omar.

Contract Act, S 16—Donor and donee—Relationship between, raising presumption of influence of latter over former—Evidence of—Validity of gift in case of—Onus of proof on donee of—Nature and quantum of proof required—Independent legal advice if only means of discharging onus—What constitutes such advice.

Where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor, the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will.

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*P.C. Appeal No. 64 of 1927. 15th October, 1928.

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Independent legal advice is not the only way in which the presumption referred to above can be rebutted. It is not correct to say lay down that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. Independent legal advice, to satisfy the rule in cases where such advice is relied upon, must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

Appellant sued to set aside a deed of gift of substantially all her properties executed by her in favour of the respondent, a nephew by marriage of the appellant. Appellant was wholly illiterate; she was a feeble old woman, unable to leave the house, relying entirely upon the respondent for everything—even for her food and clothes—leaving the management of her affairs to him, so that she had no knowledge of her own affairs or as to the value of her properties, and so that she was totally and completely in the respondent's hands.

Held, that the relations between the appellant and the respondent were amply sufficient to raise the presumption of the influence of the respondent over the appellant and to render it incumbent upon him to prove that the gift was the spontaneous act of the appellant, acting under circumstances which enabled her to exercise an independent will and which justified the Court in holding that the gift was the result of the free exercise of her will.

Held further that the facts proved by the respondent were not sufficient to rebut the presumption of undue influence which was raised by the relationship proved to have been in existence between the parties

Appeal No. 64 of 1927 from a judgment of the Supreme Court of the Straits Settlements, Singapore (August 6, 1926), reversing a judgment of Deane, J.

Jenkins, K.C. and *Macaskie* for appellant.

W. A. Greene, K.C. and *Greenland* for respondent.

15th October, 1928. The judgment of their Lordships was delivered by

Lord Chancellor.

LORD CHANCELLOR.—In this case the appellant brings an action against the respondent claiming that a deed of gift, dated the 18th April, 1922, and made between the appellant and respondent, should be set aside on the ground that the relationship between the parties at the time when the deed was executed was such as to raise a presumption of undue influence against the respondent, and that that presumption had not been rebutted. The respondent denies that the relationship between the parties was such as to raise any presumption, and alleges

that if there were such a relationship, the presumption was rebutted. The Trial Judge decided in favour of the appellant; but his judgment was reversed by the Court of Appeal, which held, by a majority, that there was no such relationship as raised any presumption of undue influence, and that if there were such presumption, it had been rebutted by the facts proved by the respondent. The facts leading up to the present action are as follows:—

The appellant is a Malay woman, wholly illiterate and of great age. The respondent is of Arab birth, and is the nephew by marriage of the appellant. The appellant's husband died before the year 1902, leaving her a considerable amount of landed property. This property consisted of (*a*) Two pieces of leasehold land of an area of some 4,097 sq. ft., situate at Minto Road, in Singapore, and held by him at a rental of $2 per annum for a term of 99 years from October, 1858 (*b*) A house known as 104, Southbridge Road, Singapore, held for a term of 999 years at a rent of $1 per annum. (*c*) Certain leasehold premises known as 1, 2 and 3, Minto Road, together with a small piece of land in McPherson Road, Singapore.

Shortly after her husband died, the appellant conveyed the whole of this estate to her daughter, Seetee Mariam, who was herself a widow and the sole surviving child of the appellant; and the appellant and her daughter then lived together at No. 2, Minto Road. The respondent came to Singapore about the year 1905, being then some twenty-three years of age. He went to live with his aunt, the appellant, and his cousin, Seetee Mariam, at No. 2, Minto Road. The respondent married in 1908, and brought his wife to live with him at this house. The respondent was entirely without means when he reached Singapore, and the appellant started him in business. At a subsequent date the respondent divorced his wife and remarried, and then went to live at No. 3, Minto Road, which he rented from Seetee Mariam at $10 a month. The two houses, Nos. 2 and 3, Minto Road, adjoined one another and there was a through communication between the two, and the respondent saw the appellant daily.

From 1918 onwards the respondent collected the rents of her properties for Seetee Mariam. On the 25th August, 1921, Seetee Mariam died, and the appellant became entitled to the properties as her next of kin. On the 12th September, 1921, the appellant executed a deed appointing the respondent her attorney for the purpose of obtaining letters of administration

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of the estate of Seetee Mariam, to be granted to him for her benefit; on the 23rd September, 1921, letters of administration were granted to the respondent accordingly. On the 1st March, 1922, the respondent conveyed to the appellant the whole of the properties as the legal personal representative of Seetee Mariam, but he continued to collect the rents. The respondent had employed Messrs. Drew and Napier, a well-known firm of solicitors in Singapore, to act for him in regard to the grant of letters of administration. On the 18th April, 1922, the appellant executed a deed of gift whereby she gave to the respondent absolutely the whole of the properties referred to under (*a*) and (*b*) above, and left herself with a total gross income of about $30 a year. The properties comprised in the deed of gift had been sworn by the respondent for probate at $23,600, and No. 104, Southbridge Road was then let at a rental of $100 a month, and was assessed for rates at $250 a month.

At the time when the deed was executed, and ever since the death of her daughter, the appellant had lived alone at No. 2, Minto Road, with the respondent in the communicating house next door. The appellant was so old and infirm that she was unable ever to leave the house, and she seldom saw any of her relatives or friends; the respondent managed the whole of her affairs, including all her domestic affairs, and bought her food and clothing.

The respondent called evidence to show that before executing the deed, the appellant had independent advice from Mr. James Aitken, a lawyer of Singapore. Mr. Aitken gave evidence, and deposed that early in April, 1922, the respondent sent for him and told him that the appellant desired him to prepare a deed of gift in his, the respondent's, favour; that he accordingly attended at No. 2, Minto Road, and received instructions from the appellant to prepare such a deed of gift; he thinks that the details as to the leases of the land were given by the respondent. After receiving these instructions he saw the respondent at his office on a number of occasions, and he stated that on one occasion he told the respondent that he had better get another solicitor to represent him in order to protect his interests. After preparing the deed of gift, he took it to the appellant's house and explained it to her; the respondent was there when he arrived, but was not present during the explanation. He read the deed to the appellant and told her that

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it was irrevocable, and that it gave the property absolutely to the respondent, and he asked her if she signed voluntarily. He did not know that she was parting with practically the whole of her property, and he asked no questions as to the value of her total estate; he thought when he saw her that she was about 80 years of age and that she would not live long; he did not advise her that if she desired to ensure the respondent having her property after her death it would be possible to do so by will. His fees for drawing the deed of gift were paid by the respondent out of rents collected by him on behalf of the appellant. In addition to this evidence, a Mr. Campbell, another lawyer of Singapore, was called by the respondent, and stated that on the instructions of one of the appellant's relatives who had heard of the deed of gift, he went to see the appellant at her house on the 20th May, 1922; that the appellant was very angry at his coming, and said that she had made the deed voluntarily and that the respondent maintained her and took care of her, and that she did not wish the transaction set aside. The interview lasted about ten minutes; the respondent was not present when he arrived, but as Mr. Campbell was explaining to the appellant why he had come, the respondent came in and asked what was happening, and the witness thereupon explained how he came to be there, and left the house.

The appellant's evidence at the trial was disregarded, because it was recognised by both sides that her mind was then in such a state as to render her evidence quite valueless. The respondent gave evidence, but the learned Trial Judge did not believe his testimony. The learned Trial Judge found that from the death of her daughter onwards the appellant was a feeble old woman, unable to leave the house, relying entirely upon the respondent for everything—even for her food and clothes—leaving the management of her affairs to him, so that she had no knowledge of her own affairs or as to the value of her properties, and so that she was totally and completely in the respondent's hands. He held that when the deed was executed by the appellant her relationship with the respondent was such that he had gained complete ascendancy over her, and that the presumption arose that the deed was procured by his undue influence. He held further that the appellant had had no independent legal advice, and that the circumstances were not such as to rebut the presumption. At the hearing before this Board the respondent contended that there was no confidential relationship between the parties giving rise to any presumption; that if there was

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any such relationship, the gift was not referable to the relationship; and that in any event the evidence called by the respondent was sufficient to rebut the presumption, if it ever arose.

The principles upon which this case falls to be decided have been the subject of a series of decisions in the English Court of Chancery; and it was not disputed between the parties that the principles of English Law must be applied. The question to be decided is stated in the judgment of Lord Justice Cotton in the well-known case of *Allcard* v. *Skinner*[1] as follows:

> "The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes. first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

In their Lordships' view the relations between the appellant and respondent are correctly summarised in the judgment of the Trial Judge, and they are amply sufficient to raise the presumption of the influence of the respondent over the appellant and to render it incumbent upon him to prove that the gift was the spontaneous act of the appellant, acting under circumstances which enabled her to exercise an independent will, and which justified the Court in holding that the gift was the result of the free exercise of her will.

At the hearing before this Board there was much discussion upon the question whether the presumption can be rebutted in any other way than by proof of independent legal advice, and also as to what constituted sufficient independent legal advice for this purpose. A number of cases were cited containing expressions of opinion by various learned Judges, some of which are not easy to reconcile unless they are treated as governed by the particular facts of the case then under discussion. Their

1. (1887) 36 Ch. D. 145 at 171.

Lordships are satisfied that in the present case there were no circumstances except the giving of independent legal advice, if that was given, to rebut the presumption; but since the cases have never been reviewed in any ultimate Court of Appeal, their Lordships think it right to state the conclusion which they have reached.

For the appellant reliance was placed on the case of *Rhodes* v. *Bate*,[2] and the passage in the judgment of Lord Justice Turner at p. 257:

> "I take it to be a well-established principle of this Court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them"

and the language used by Farwell, J., in *Powell* v. *Powell*[3] at pages 245 and 246:

> "It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must show (and the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation"

and on the further statement of the learned Judge:

> "Further, it is not sufficient that the donor should have an independent adviser unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and so defeat the rule; but the stronger the influence the greater the need of protection. The real meaning of the rule is that the youth, being in the eye of the Court unfit to deal irrevocably with his parent or guardian in the matter of a gift of this kind, must appoint some independent adviser to act for him It is the action resulting from the advice, not action against the advice, that binds the donor."

On the other hand, the respondent relied on a number of statements of the law which indicate that independent advice is only one of the methods by which the presumption can be rebutted. As an instance, the judgment of Wright, J., in *Morley* v. *Loughnan*,[4] where the learned Judge says:

> "The burthen lies on the recipient to show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances"

and on the judgment of the Court of Appeal in the case of *In re Coomber*.[5]

2. (1865) L.R. 1 Ch. 252.
3. (1900) 1 Ch. 243.
4. (1893) 1 Ch. 736 at 752.
5. (1911) 1 Ch. 723.

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The decision in each of these cases seems to their Lordships to be entirely consistent with the principle of law as laid down in *Allcard* v. *Skinner*[1]. But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Lord Justice Cotton, and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

In the present case their Lordships do not doubt that Mr. Aitken acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relation-

1. (1887) 36 Ch. D. 145 at 171.

ship proved to have been in existence between the parties; and they regard it as most important from the point of view of public policy to maintain the rule of law which has been laid down and to insist that a gift made under circumstances which give rise to the presumption must be set aside unless the donee is able to satisfy the Court of facts sufficient to rebut the presumption.

It follows that in their Lordships' opinion the appeal must be allowed; the judgment of the Trial Judge must be restored, and the respondent must pay the costs of the action in the Courts below and of the appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Tamplin, Tayler & Joseph.*

Solicitors for respondent: *Nisbet, Drew & Loughborough.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Janapareddi Venkatareddi .. *Appellant** (*1st Claimant*)

v.

Janapareddi Adhinarayana Rao ..*Respondent* (*2nd Claimant*).

Land Acquisition Act (I of 1894). Ss 30 and 54—Reference to Subordinate Judge's Court by Land Acquisition Officer—Decision by the Court —If amounts to an award—Subject-matter of lis *less than Rs 5,000—Appeal to High Court—Maintainability—Forum of appeal.*

The decision of a Subordinate Judge's Court on a reference made by the Land Acquisition Officer under S 30 of the Land Acquisition Act is not an award within the meaning of that Act and consequently an appeal from that decision, where the subject-matter of the *lis* is less than Rs 5,000, does not lie to the High Court but lies to the District Court

Ramachandra Rao v. *Ramachandra Rao,* (1922) I.L.R. 45 Mad. 320· L.R. 49 I.A. 129· 43 M.L J. 78 (P.C.) referred to.

S.R. No. 7968 etc. of 1927 followed.

Appeal against the award, dated 30th April, 1926, of the Court of the Subordinate Judge of Vizagapatam in Original Petition No. 8 of 1925.

Y. Suryanarayana for appellant.

G. Lakshmanna for respondent.

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*Appeal No. 109 of 1927. 16th August, 1928.

Venkata-reddi v. Adhinarayana Rao.

Ramesam, J.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—This is an appeal against the decision of the Subordinate Judge of Vizagapatam on a reference to him under S. 30 of the Land Acquisition Act.

The facts are as follows:—The Special Deputy Collector, Harbour Acquisition, Vizagapatam, made his award on 18th January, 1925. As to the apportionment of one of the amounts he awarded, there was a dispute between two claimants. Without deciding their claims he referred the matter to the Civil Court under section 30. The amount in dispute which was referred to the Subordinate Judge's Court was Rs. 1,349. A preliminary objection is raised by the vakil for the respondent that this appeal does not lie to the High Court but to the District Court of Vizagapatam We think this objection is well founded. After a reference under section 30 is made to the Civil Court, the decision of the Court cannot be regarded as an award under Part III of the Act. In the case reported in *Ramachandra Rao* v. *Ramachandra Rao*[1] their Lordships of the Privy Council observe that there are two perfectly separate and distinct forms of procedure contemplated under the Act and where there is a dispute as to the relative rights of the persons together entitled to the money the duty of the Collector is "to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be. How the proceedings were commenced is a matter that is not material, provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board."

These observations show that a decision on a reference under section 30 was regarded as a decree and not as an award as then understood, and it attracted all the usual consequences of an appeal to the High Court and a further appeal to the Privy Council like all decrees of Subordinate Courts. That is, the view taken there was that it was a decree governed by the Code of Civil Procedure and the Civil Courts Act. If so, the subject-matter of the *lis* being only Rs. 1,349, the appeal from the Subordinate Judge does not lie to the High Court but only to the District Court, because the value is less than Rs. 5,000. This was the view taken by our brothers, Devadoss and Jackson, JJ., in S.R. No. 7968 etc. of 1927.

1 (1922) L.R. 49 I.A. 129: I.L.R. 45 Mad. 320: 43 M.L.J. 78 (P.C.).

Venkatareddi v. Adhinarayana Rao.

Venkatasubba Rao, J.

I must allow the preliminary objection and direct the appeal memorandum to be returned for presentation to the proper Court. Costs will abide the result.

Venkatasubba Rao, J.—The short question to be decided is, is the decision of the Court under section 30 of the Land Acquisition Act an award within the meaning of that Act? If it is, an appeal lies to the Court under section 54; otherwise not. To answer this question, we must have regard to the scheme of the Act. If the Collector decides as regards the persons to whom the compensation is payable, but any of the claimants is dissatisfied with that decision, the person so dissatisfied may require the matter to be referred by the Collector for the determination of the Court. Section 18 (1) deals with such a reference. It runs thus:

"Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, *whether his objection be* to the measurement of the land, the amount of the compensation, *the persons to whom it is payable,* or the apportionment of the compensation among the persons interested"

I have now referred to what happens when the Collector's award contains a decision in regard to the persons to whom the compensation is payable. The Act seems also to provide for a case where the Collector's award does not contain such a decision. Section 30 provides for that case. It is in these terms:

"When the amount of compensation has been settled under S 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court."

Here I must notice a slight inconsistency in the Act. S. 11 enacts that the Collector shall proceed to enquire *inter alia* "into the respective interests of the persons claiming the compensation" and that he shall make an award dealing also with the question of the apportionment of the amount awarded. But the Legislature seems to have overlooked that the word used in section 11 is "shall" and assumes in section 30 that the Collector has the option either to decide that question himself or to refer it to the decision of the Court. This defect in the Act does not materially affect the question before us. The reference in the present case was made under section 30 and the point we have to decide is, if the Court gives its decision on such a reference, is that adjudication an award or not? It seems to me that *Ramachandra Rao* v. *Ramachandra Rao*[1]

1. (1922) L.R. 49 I.A. 129: I.L.R. 45 Mad. 320: 43 M.L.J. 78 (P.C.).

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contains a decisive ruling on the point and that we can no longer be guided by the earlier decisions of the Indian High Courts. It must be borne in mind that whereas Part III of the Act uses the word "award" to describe the adjudication of a Court, section 30 and similar sections carefully abstain from the use of that term. Is this a matter of no significance? In the case to which I have referred, Lord Buckmaster in his judgment says, that there is a sharp distinction between the two forms of procedure contemplated by the Act. One of them relates to the fixing of the amount of compensation and this alone is described as being an award. But a dispute between the persons claiming compensation, involving questions of title, is a separate and distinct form of procedure and a decision in regard to that is not described as an award. It is unneeessary for me to enquire at present, whether when an award made by the Court under section 26 (Part III) contains an adjudication as to title, that adjudication is or is not an award. What the necessary implications of the judgment of Lord Buckmaster in this respect are, I do not at present propose to consider; it is sufficient in this appeal to say that the decision of a Court on a reference under section 30 is clearly not an award. If it is not an award, it follows that an appeal to this Court does not lie under section 54.

I therefore agree in the judgment just pronounced by my learned brother.

N.S. *Appeal returned for presentation to proper Court.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Palimuthu Ambalagar .. *Petitioner* in both (Accused in both)*

v.

The President, Union Board, Kattuputhur .. *Respondent in both (Complainant in both).*

Palimuthu Ambalagar v. The President, Union Board, Kattuputhur.

Survey and Boundaries Act, Ss 13, 14—Decision of Survey Officer under the Act—Criminal prosecution launched within three years of—Title to land affected by decision of Survey Officer—Jurisdiction of Criminal Court to consider

In a criminal prosecution launched within three years of a decision of the Survey Officer under the Survey and Boundaries Act, the Criminal Court is not, in a case in which no civil suit has been filed contesting the

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*Cr R C Nos. 934 and 935 of 1927. 31st August, 1928.
(Cr R P Nos. 839 and 840 of 1927).

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decision of the Survey Officer or a suit has been filed and its result is not known, precluded from considering the question of title to the land covered by the said decision.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the Sub-divisional Magistrate of Musiri in Criminal Appeals Nos. 32 and 33 of 1927 preferred against the judgments of the Court of the Stationary 2nd Class Magistrate of Musiri in Calendar Cases Nos. 92 and 91 of 1927 respectively.

T. M. Krishnaswami Aiyar for petitioner.

K. Krishna Menon for *K. Venkataraghavachari* for *The Public Prosecutor-in-charge* on behalf of the Crown.

S. Panchapakesa Sastri for respondent.

The Court made the following

ORDER.—These are applications for revising the conviction of the petitioner under section 207 of the Local Boards Act of 1920. The petitioner in each case was asked to remove an encroachment upon a vacant site belonging to the Union and the prosecution was for non-compliance with the notice within the time fixed. The petitioner was prosecuted and fined Rs. 20 in each case. There was some dispute in respect of the vacant land between the Union Board and the Pillayar temple of which the petitioner in Cr.R.C. No. 934 of 1927 is the Dharmakartha, and also in respect of the plot of land in front of the land of the petitioner in Cr.R.C. No. 935 of 1927. There was a survey of the lands belonging to the Union Board and under the survey the plots in dispute were marked off as belonging to the Union Board and a notification was published in the District Gazette as required by section 13 of the Surveys and Boundaries Act. That was somewhere in 1926. Notice was issued to the petitioner in both the cases, in October 1926, to remove the obstruction and again another notice was issued, Ex. B, in February 1927. The petitioner not having complied with the notice, prosecution was launched against him and he was found guilty and sentenced to pay a fine of Rs. 20 in each case.

The question that is raised by Mr. Krishnaswami Aiyar is that the decision of the Survey Officer is not conclusive as regards the title to the property inasmuch as the petitioner has three years from the date of the notification to file a suit to modify the order of the Survey Officer. Under section 13, unless the survey so notified be modified by a decree of a Civil

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Court under the provisions of section 14, the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded. Section 14 of the present Act gives three years to a party to file a suit for setting aside or modifying the order of the Survey Officer. The three years have not elapsed. The question is whether in a prosecution launched before the expiry of the three years, a Criminal Court is debarred from considering the question of title to the land in dispute or whether the Criminal Court is bound to hold that the order of the Survey Officer is conclusive on the question of title. If no suit is filed within three years the order of the Survey Officer would be conclusive proof as to the boundaries determined and recorded by him. Before the expiry of three years the party against whom the order is made has a right to institute a suit and if the result of the suit be that the order of the Survey Officer is wrong, then the order of the Survey Officer will have to be set aside or modified. The question is whether, when a prosecution is launched before the expiry of three years, a Criminal Court is entitled to go into the evidence as to the title to the property, taking the decision of the Survey Officer as *prima facie* evidence in favour of it, or whether a Criminal Court is precluded from doing so by reason of the order of the Survey Officer. Reliance is placed by Mr. Panchapakesa Sastri upon the wording of section 13 that unless set aside or modified by the decree of a Civil Court, the order shall be conclusive proof that the boundaries determined and recorded have been correctly determined and recorded. No doubt, this clause, if it had stood alone, would mean that the order of the Survey Officer is conclusive proof of the boundaries determined and recorded by him, but his order is subject to the decision of a Civil Court, and, for filing a civil suit, the law gives a period of three years. If before the expiry of the three years a prosecution is launched, I think a Criminal Court is not precluded from going into the question of title to the property in dispute and to decide on the evidence whether the property in dispute belongs to the Union Board or to the accused, in other words, the Court is entitled to go behind the order of the Survey Officer. When a prosecution is launched, it is for the prosecution to make out affirmatively all the ingredients necessary to make out the offence and the fact that under the law an order, if not modified is conclusive proof, is not sufficient to oust the jurisdiction of a Criminal Court to con-

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sider whether on the evidence before it the prosecution has made out the offence. If a suit had been filed within three years and had been dismissed, no doubt the remedy under section 14 given to the unsuccessful party may be taken as having been negatived; but where no suit has been filed or where a suit has been filed and the result of the suit is not known, I do not think a Criminal Court is debarred from going into the question as to the ownership of the land in respect of which the prosecution is launched before the expiry of three years, from the date of the Survey Officer's order.

In this view, the judgment of the Lower Courts ought to be set aside. The accused has adduced some evidence as to the ownership of the land and the Appellate Magistrate has declined to consider the evidence in his view of the law that the Survey Officer's order is conclusive as to the ownership of the land in dispute. The Trial Court has also been misled in its appreciation of the evidence by its view that the question of the ownership of the land is concluded by the determination of the Survey Officer. I think the proper order would be to set aside the conviction in both cases and direct the Trial Court to weigh the evidence as regards the ownership of the land and dispose of the cases according to law. The fine, if paid, will be refunded.

A. S. V. *Order set aside.*

PRIVY COUNCIL.

P. C.

In re Compensation to Civil Servants.

[*Special reference in the matter of certain questions relating to the payment of compensation to Civil Servants under Art.* 10 *of the Articles of Agreement for a Treaty between Great Britain and Ireland.*]

PRESENT:—MARQUESS OF READING, LORD PHILLIMORE, LORD HANWORTH, LORD ALNESS AND CHIEF JUSTICE ANGLIN.

Privy Council—Decision previous of—Reconsideration of—Jurisdiction—Practice—Re-hearing on application of party to previous decision or stranger thereto—Re-hearing on a reference under S 4 of Judicial Committee Act of 1833*—Distinction.*

There is no inherent incompetency in ordering a rehearing of a case already decided by the Board, even when a question of a right of property is involved, but such an indulgence will be granted in very exceptional circumstances only. It is of the nature of an *extraordinarium remedium*

Cases in which one of the parties to a suit which had been decided against him, or a person who was not a party to the suit, applied for

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a rehearing of it, have no direct application to the question of the competency of the Board to reconsider a solemn decision by a previous Board on a reference under S. 4 of the Judicial Committee Act of 1833.

This matter was referred to their Lordships by Order of His Majesty in Council, dated 15th June, 1928, and made under section 4 of the Judicial Committee Act, 1833.

A. Alfred Dickie, James Henry and *Miss A. Deverill* for Transferred Officers.

A. K. Overend, Chas. Bewley and *T. A. Finlay* for Attorney-General of Irish Free State.

Attorney-General, Solicitor-General and *H. M. Giveen* for British Government.

13th Nov. 1928. The opinion of their Lordships was delivered by

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THE MARQUESS OF READING.—At the outset of the hearing in this reference, Mr. Dickie, who attended their Lordships on behalf of the Council of the Transferred Officers' Protection Association, argued that the Board is bound in law, and without examination, to follow the decision in the appeal in *Wigg* v. *Attorney-General of the Irish Free State*,[1] whether they considered it to be right or wrong. He maintained that if it was wrong, nothing short of an Act of Parliament could rectify it. Their Lordships are unable to hold that this proposition stated in such an extreme form is established. It may well be that the Board would hesitate long before disturbing a solemn decision by a previous Board, which raised an identical or even a similar issue for determination; but for the proposition that the Board is, in all circumstances, bound to follow a previous decision, as it were, blindfold, they are unable to discover any adequate authority. In other words, no inflexible rule, which falls in all circumstances to be applied, has been laid down.

Mr. Dickie based his argument mainly upon cases in which one of the parties to a suit which had been decided against him, or a person who was not a party to the suit, applied for a rehearing of it. Their Lordships must however point out, in considering these cases, that they have no direct application to the matter before the Board, as this Reference is not a rehearing of the claims in *Wigg* v. *Attorney-General of the Irish Free State*.[1] Now there can be no doubt that, in the early cases, a rigid standard was applied to the competency of a rehearing. Thus, in *Rajundernarain Rae* v. *Bijai Govind Sing*,[2] Lord Brougham, in delivering the opinion of the Board, permitted himself

1. (1927) A.C. 674. 2. (1836) 1 Moo. P.C. 117: 2 Moo I.A. 181.

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to make some general observations, which seem, at first sight, to favour Mr. Dickie's contention. In that case an application was made for a rehearing. The decision in the earlier case had been given *ex parte*, and was pronounced by default. The earlier order was in these circumstances rescinded, and a re-hearing was allowed. Lord Brougham, in giving the opinion of the Board, however, said (p. 126):—

"It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be reheard, and that an order once made—that is, a report submitted to Her Majesty, and adopted, by being made an order in Council—is final, and cannot be altered. The same is the case of the judgments of the House of Lords . . . Whatever therefore has been really determined in these Courts must stand, there being no power of rehearing for the purpose of changing the judgment pronounced."

Lord Brougham then pointed out that trivial errors in drawing up the judgment of the Board might competently be corrected. He then proceeded to add:

"With the exception of one case in 1669, of doubtful authority here, and another in Parliament of still less weight in 1642 (which was an appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a rehearing upon the whole cause, and an entire alteration of the judgment once pronounced."

The case referred to by Lord Brougham as "of doubtful authority" was *Dumaresq* v. *Le Hardy,* 11th March, 1667-68 (page 127 of the report *supra*). There it was alleged that a matter of fact had been misrepresented to the earlier Court, that consequently the point in question was mistaken, and that the cause had been determined against the petitioner's clear and undoubted right and contrary to law. An order for rehearing was there made and the case was reheard though, in the result, the Board adhered to the former decision.

The case of *Fenton* v. *Hampton*[3] cited during the argument related to another proposition which dealt with the binding character of an earlier decision upon the Board in a later case. The Board there said (page 396):

"We think that we are bound by the decision in the case of *Kielley* v. *Carson*,[4] the greater authority of which, as compared with *Beaumont* v *Barrett*,[5] it is quite unnecessary to enlarge upon."

In *Kielley* v. *Carson*[4] the Board had refused to follow the earlier decision of *Beaumont* v. *Barrett*[5] for reasons which do

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3 (1858) 11 Moo. P.C. 347. 4 (1841) 4 Moo. P.C. 63.
5 (1836) 1 Moo. P.C. 59.

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not touch the argument in the present case. These decisions do not contribute to the solution of the problem in issue.

Reference may also be made to the case of *The Singapore & the Hebe*[6] which again related to rehearing. In refusing a petition for rehearing, the Board at p. 388 said:

"We do not affirm that there is no competency in this Court to grant a rehearing in any case. . . Although it is within the competency of the Court to grant a rehearing, according to the authorities cited above, still it must be a very strong case indeed, and coming within the class of cases there collected (*i e*, in *Rajunder narain Rae* v *Bijai Govind Sing*[2]) that would induce this Court so to interfere."

The case which in comparatively recent times comes nearest to formulating a general proposition with reference to the competency of a rehearing is *Hebbert* v. *Purchas*.[7] The decision of the Board is thus set out at p. 671:

"Their Lordships are of opinion, in respect of the two petitions addressed to the Crown, that no further proceedings should be taken therein. Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused with costs."

It will be observed that the decision turned on expediency, not on competency, and that the Board abstained from laying down any general rule which is applicable to all cases.

The case of *Hebbert* v. *Purchas*[7] was considered in *Ridsdale* v. *Clifton*.[8] That was a case which raised the question of the finality of a previous decision, not *inter partes* but as against strangers. Having regard to the fact that the case was not concerned with questions of law affecting civil rights of property, but related to the public worship of the Established Church, and that in *Hebbert* v. *Purchas*[7] the decision was pronounced *ex parte*, the Board stated that

"these considerations have led their Lordships to the conclusion that, although very great weight ought to be given to the decision in *Hebbert* v. *Purchas*[7] yet they ought in the present case to hold themselves at liberty to examine the reasons upon which the decision was arrived at, and, if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law" (p. 307)

The Lord Chancellor, Lord Cairns, in giving the decision of the Board, added with reference to decisions relating to civil rights of property:

"Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases,

2. (1836) 1 Moo P.C. 117: 2 Moo I.A. 181.
6. (1866) L.R. 1 P.C. 378: 4 Moo P.C. 271
7. (1871) L.R. 3 P.C. 664. 8. (1877) L.R. 2 P.D. 276.

absolutely final, but they certainly ought not to be reopened without the very greatest hesitation'' (p. 306).

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The door is thus not closed against a request for a rehearing at the instance of a stranger to an earlier decision, even in a case concerned with civil rights of property, although it is plainly indicated that the Board would be slow to accede to such a request.

The case of *Hebbert* v. *Purchas*[7] was followed in *Venkata Narasimha Appa Row* v. *The Court of Wards*,[9] in which again a petition for rehearing was refused. In delivering the judgment of the Board, however, Lord Watson said (p. 663):

"It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be reheard at the instance of one of the parties''

But he added . . . .

''Even before report, whilst the decision of the Board is not yet *res judicata*, great caution has been observed in the rehearing of appeals'' (p 663).

Again, in the case of *Tooth* v. *Power*[10] in which a previous decision was urged upon the Board as binding upon it, the Judicial Committee said:

"Their Lordships think it right to add that, although, for obvious reasons, the case of *Barton* v *Muir*[11] was relied on as an authority absolutely binding upon them by both parties at the Bar, yet it would have been their duty, had the necessity arisen, to consider for themselves whether the decision is one which they ought to follow. It was given *ex parte;* and that being the case, although great weight is due to the decision of this Board, their Lordships are at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law These are the words used by Lord Cairns when delivering the judgment of the Board in *Ridsdale* v. *Clifton*,[8] which contains a full exposition of the law upon this point'' (p. 292).

In *Read* v. *Bishop of Lincoln*[12] their Lordships referred to *Hebbert* v. *Purchas*[7] and *Ridsdale* v. *Clifton*[8] and quoted the relevant passages from these decisions to which reference has already been made. The Board proceeded to say:

''In the present case their Lordships cannot but adopt the view expressed in *Ridsdale* v. *Clifton*[8] as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law'' (p 655).

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7. (1871) L.R. 3 P.C. 664 8. (1877) L.R. 2 P.D. 276
9 (1886) 11 App. Cas. 660: L.R 13 I.A. 155: I.L.R. 10 M. 73 (P.C.).
10. (1891) A.C. 284. 11 (1874) L.R. 6 P.C. 134.
12. (1892) A.C. 644.

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The result of these decisions is (1) that there is no inherent incompetency in ordering a rehearing of a case already decided by the Board, even when a question of a right of property is involved, but (2) that such an indulgence will be granted in very exceptional circumstances only. It is of the nature of an *extraordinarium remedium*.

The matter now before their Lordships, however, presents features which are widely different from those presented in the cases cited.

In the first place, as has already been pointed out, this is not a petition for a rehearing. It is a reference to the Board under section 4 of the Judicial Committee Act of 1833. If, however, Mr. Dickie is right, the reference may be a futile and sterile proceeding, for, on his argument, one of the parties to it is foredoomed from the outset to failure because of the previous decision. If by that decision the matter of the present reference is *res judicata*, then the Board has been invited to take part in a solemn farce, involving the waste of judicial time.

In the second place, the reference was granted because of an alleged mistake of fact into which the previous Board was alleged to have fallen, and which is said to have been material to the issue determined by it. To suggest that, if that proposition be made out, this Board is constrained, blindfold, to adhere to a decision based on a material error in fact, appears to be repugnant to good sense, and to attribute to the Board, as a Court of final resort, an importance which would be deplorable. None of the cases cited, unless it be the case of *Dumaresq*—which, *quantum valeat*, is inimical to Mr. Dickie's argument—deals with such a situation; and none of them appears to present an insuperable obstacle to a different decision being reached by the Board in this case from that pronounced in the case of *Wigg and Cochrane*.

In these circumstances their Lordships considered, after careful attention had been given to the argument on behalf of the Civil Servants, that it was ill-founded in law, and they accordingly informed the learned Attorney-General that they did not think it necessary to require him to reply on this topic.

Solicitors for Transferred Officers: *H. Z. Deane & Co.* for *W. J. M. Cauller, Dublin*.

Solicitors for Attorney-General of the Irish Free State: *Coward, Chance & Co.*

Solicitors for British Government: *Treasury Solicitor*.

K.J.R. —— *Reference answered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE WALLACE, MR. JUSTICE BEASLEY AND MR. JUSTICE PAKENHAM WALSH.

Vasudeva Samiar *alias* Vasudeva Pillai .. *Appellant** (*Appt. in S.A. No. 790 of 1924 on the file of the High Court*).

F. B.
Vasudeva Samiar, *In re.*

Letters Patent (as amended in 1928), clause 15—Applicability—Suit instituted in July, 1919—Second Appeal in it presented on 15th July, 1924 and disposed of by single Judge on 9th February, 1928—Letters Patent Appeal in case of—Right of—Effect of amended Letters Patent Appeal on—Suit—Appeals in force at time of institution of—Party's right to.

The plaint in a suit was presented on 30th July, 1919. The second appeal in it was presented on 15th July, 1924 and was finally disposed of on 9th February, 1928 On 24th April, 1928 a Letters Patent Appeal was filed against the decision of the single Judge in the Second Appeal. Before that Letters Patent Appeal was presented the amended Letters Patent of 1928 had become applicable to the Presidency on the 31st of January.

Held, that the amended Letters Patent was inapplicable to the case and that the right to prefer a Letters Patent Appeal without the certificate of the Judge who decided the Second Appeal which the litigant had before the amendment was not affected by the amended Letters Patent

The institution of the suit carries with it the implication that all appeals then in force are preserved to it through the rest of its career unless the legislature has either abolished the Court to which an appeal then lay or has expressly or by necessary intendment given the Act a retrospective effect. The words of the amended Letters Patent do not admit of such an interpretation.

Appeal sought to be preferred under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Devadoss, dated 9th February, 1928 in Second Appeal No. 790 of 1924 preferred to the High Court against the decree of the Court of the Subordinate Judge of Kumbakonam in Appeal Suit No. 22 of 1923 (O.S. No. 295 of 1919 on the file of the Court of the District Munsif of Valangiman).

A. Krishnaswami Aiyar, and *T. S. Srinivasa Aiyar* for appellant argued:—The second appeal in this case was originally filed on 15th July, 1924. Devadoss, J., heard it on 21st March, 1927 and called for findings. It was finally disposed of by a single Judge on 9th February, 1928.

The Letters Patent Appeal which is under dispute was filed in the High Court on 24th April, 1928. Meanwhile the amended Letters Patent, clause 15, came into force on 31st January,

*S.R. No. 12176 of 1928. 18th October, 1928.

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1928. The question is whether the appeal is maintainable without the certificate which is required by the amended clause 15.

I contend that my right to file the Letters Patent Appeal is governed by the old Letters Patent and there is no necessity for any leave from the Judge who decided it. The suit was filed in 1920, long before the amended Letters Patent. I contend that the moment the suit is filed, I have all the rights of appeals then existing. Alternatively I contend that as soon as the second appeal is filed in the High Court, I have a right to have my appeal decided by two Judges. My contention is supported by a recent ruling of a Special Bench of the Calcutta High Court in *Sheikh Sardar Ali* v. *Sheikh Dolliluddin Ostagar,*[1] which follows *Colonial Sugar Refining Company* v. *Irving.*[2] In the latter case, the facts are these:

By an Australian Act, the High Court of Australia became vested with the right of appeal. When the suit was launched, which was prior to that enactment, the appeal lay to the Privy Council. It was contended that no question of right of appeal arose before judgment was given. The Privy Council held that the right of appeal meant a right to appeal to a particular tribunal which was a vested right. This case was followed by the Madras High Court in two Full Bench cases, namely, *Ramakrishna Aiyar* v. *Sithai Ammal*[3] and *Daivanayaka Reddiar* v. *Renukambal Ammal*[4]; as also in *Ram Singha* v. *Shankar Dayal*[5] and *The Delhi Cloth and General Mills Co., Ltd.* v. *The Incometax Commissioner, Delhi.*[6]

The case in *Canada Cement Co., Ltd.* v. *East Montreal (Town of)*[7] which is cited against me is not really against me. It only carries out the principle laid down in *Colonial Sugar Refining Company* v. *Irving.*[2]

The Government Pleader contra argued: The right of appeal depends on the continued existence of the competent Court. When that competent Court is abolished the right of appeal also goes. There is no vested right of appeal. *See* section 13 of the Charter Act and section 106 of the Government of India Act. The Letters Patent is the source of authority and jurisdiction of the High Court. The Charter which

1. (1928) 48 C.L.J 150 (S.B). 2 (1905) A C. 369
3 (1924) I.L.R. 48 M 620: 49 M.L J. 223 (F.B).
4 (1927) I.L.R. 50 M. 857 53 M L.J 637 (F B.)
5 A.I.R. 1928 All 437: 26 A L J. 998
6. (1927) L.R. 54 I.A. 421: 53 M.L.J. 819 (P.C).
7. (1922) 1 A.C. 249.

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gives jurisdiction can also take it away. I rely on *Canada Cement Co., Ltd.* v. *East Montreal (Town of)*[7] which has a direct bearing on the point. The case in *Colonial Sugar Refining Company* v. *Irving*[2] is on a different point. If it be contended that the right of appeal is not taken away, then I am on stronger ground. The right of appeal the party has is only a contingent right. There is no such vested right of appeal as is claimed. The insistence on a certificate of leave to appeal is only a matter of procedure. See *Kimbray* v. *Draper*.[8]

The Court made the following

Coutts Trotter, C. J.

ORDER. *The Chief Justice*.—This case appears to me to be indistinguishable from the case of *Sheikh Sardar Ali* v. *Sheikh Dolliluddin Ostagar*.[1] For the sake of clearness I will set out the dates in this case. The plaint was presented on the 30th July, 1919. The Second Appeal was presented on the 15th July, 1924. The Judge who heard the Second Appeal called for a finding and in consequence of that inevitable delay gave his judgment on the 9th February, 1928. On the 24th of April, 1928, a Letters Patent Appeal was filed against the judgment of the learned Judge who sitting alone had decided the Second Appeal. Before that Letters Patent Appeal was presented the amended Letters Patent of 1928 had become applicable to this Presidency on the 31st of January.

I should in any case differ from the decision in the Calcutta case cited above with great reluctance because it would lead to the result that a Second Appeal would lie in Calcutta where it would not lie in Madras. I should therefore not venture to differ from the considered opinion of the Calcutta Full Bench on any other ground than that I felt not merely that I was inclined to the opposite opinion, but that I felt that the decision offended against some standard principles of statutory construction. So far from that being the case, I entirely concur in the reasoning of Rankin, C. J., who delivered the judgment of the Court and see no answer to it. The result is regrettable because it makes the amended Letters Patent which were doubtless brought into being to relieve the heavy burden of Second Appeals, which in this Court have now reached the startling figure of 5,000 cases, unable to effect any substantial relief to us for five years.

1. (1928) 48 C.L.J. 150 (S.B.)
2. (1905) A.C. 369.
7. (1922) 1 A.C. 249.
8. (1868) L.R. 3 Q.B. 160.

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I have only one observation to add to the judgment of the Calcutta High Court and that is in reference to an argument addressed to us on a case which apparently was not cited to the Calcutta High Court. That is the case of *Canada Cement Co., Ltd.* v. *East Montreal (Town of)*[7] and it was suggested that the sentences which are to be found at the end of their Lordships' judgment were irreconcilable with the doctrine so clearly laid down by Lord Macnaghten in *Colonial Sugar Refining Co.* v. *Irving*[2] and that the later case should be followed if there was such a conflict and not the earlier. In our opinion, arrived at after a careful scrutiny of the *Canada Cement Company's case*,[7] no such conflict arises. In that case what was taken away was not the right of appeal but the very Court to which the appeal lay, namely, the Superior Court of Montreal sitting in review. By 10 Geo. V., c. 79 (Quebec) the right of appeal was transferred from the abolished Court to the Appellate Side of the Court of King's Bench in Quebec, but no provision was made for the transference of appeals which would have lain to the abolished Court to the newly constituted Appellate Court. In these circumstances their Lordships of the Privy Council held that an appeal from the Circuit Court to the Court of King's Bench did not lie; but in no way did their Lordships' opinion conflict with their earlier decision in *The Colonial Sugar Refining Company* v. *Irving*.[2] I may add that in the latter case of *The Delhi Cloth and General Mills Co., Ltd.* v. *The Income-tax Commissioner, Delhi*[6] the decision of the Board in *The Colonial Sugar Refining Co.* v. *Irving*[2] was authoritatively adopted and reaffirmed.

We must therefore hold, however reluctantly, that the institution of the suit carries with it the implication that all appeals then in force are preserved to it through the rest of its career unless the Legislature has either abolished the Court to which an appeal then lay or has expressly or by necessary intendment given the Act a retrospective effect. We agree with the Calcutta High Court that the words of the amended Letters Patent do not admit of such an interpretation.

Since the above was written, our attention has been called to the case of *Badruddin* v. *Sitaram*[9] decided by a Bench of the Bombay High Court (Fawcett and Mirza, JJ.), as recently as

2. (1905) A.C. 369.
6. (1927) L.R. 54 I A. 421: 53 M.L.J. 819 (P.C.).
7. (1922) 1 A.C. 249.
9 (1928) 30 Bom L.R. 942

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April of this year. That decision was in effect based on the case of *Framji Bomanji* v. *Hormasji Barjorji.*[10] We appreciate the desire of the Bombay Court to uphold a decision which had stood for over half a century without being explicitly reversed. But in our opinion it was overruled by necessary implication in *The Colonial Sugar Refining Co.* v. *Irving*[2] and can no longer be regarded as an authority. *Framji's case*[10] purports to establish two propositions which may be summarised shortly as follows: (1) That a deprivation of a right of appeal from a Judge or Bench of a Court to a larger Bench of the same Court is a mere matter of procedure. (2) That a statute similar in terms to the amended Letters Patent that we have to consider, must be construed as being retrospective in its operation. The first ground is disposed of by *The Colonial Sugar Refining Co.* v. *Irving,*[2] the second by the judgment of the Full Bench of the Calcutta High Court and the English cases cited in that judgment. We feel that in this matter we must reluctantly dissent from the view of the High Court of Bombay, and agree with the conclusion arrived at by the Full Bench in Calcutta.

Kumaraswami Sastri, J.—I agree.

Wallace, J.—I agree.

Beasley, J.—I agree.

Pakenham Walsh, J.—I agree.

A.S.V. *Appeal allowed to be filed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

P. A. Sundara Aiyar .. *Petitioner** (*Petitioner*)

v.

The Board of Commissioners for Hindu Religious Endowments, Madras .. *Respondent* (*Respdt.*).

Sundara Aiyar v. The Board of Commissioners for Hindu Religious Endowments, Madras.

Madras Hindu Religious Endowments Act (II of 1927), S. 84 (2) and Schedule II—Application under the section—Proper Court-fee payable—Madras Court Fees Amendment Act (V of 1922), Arts 17-A and 17-B—Whether part of Art 17 or new sections

The Court-fee payable in respect of an application under S. 84 (2) of the Madras Hindu Religious Endowments Act is Rs 15 under Art. 17 (1) of the Madras Court Fees Amendment Act of 1922

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*C.R.P. No. 1644 of 1927, etc 11th December, 1928

2. (1905) A.C. 369.

10. (1866) 3 Bom. H.C.R. 49.

Sundara Aiyar v. The Board of Commissioners for Hindu Religious Endowments, Madras.

The reference to Art 17 of the Madras Court Fees Amendment Act in Schedule II of the Madras Hindu Religious Endowments Act does not include Arts. 17-A and 17-B of the Madras Court Fees Amendment Act, as Arts 17-A and 17-B are not parts of Art. 17 but new sections.

Godasankara Walia Rajah v *Board of Commissioners, Hindu Religious Endowments, Madras,* (1928) M.W N. 509 disapproved

Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the orders of the District Court of South Malabar, Calicut in O.P. Nos. 42, 53, 80, 169, 24 of 1927, 131 of 1926, 159, 70, 110, 126, 55 of 1927 and 2 and 32 of 1928 respectively.

P. G. Krishna Aiyar and *P. Govinda Menon* for petitioner.

The Government Pleader (*P. Venkataramana Rao*) for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS. *Ramesam, J.*—These revision petitions are filed against the orders of the District Judge of South Malabar in O.P. Nos. 42 of 1927, 131 of 1926, 159, 110, 126, 55, 53, 80, 169, 24 and 70 of 1927 and 2 and 32 of 1928. The point for decision is what is the correct Court-fee payable on these petitions under section 84 (2) of the Madras Hindu Religious Endowments Act II of 1927. Under Sch. II of the said Act the Court-fee on an application to modify or set aside the decision of the Board of Commissioners for Hindu Religious Endowments under section 84 (1) of the Act is the Court-fee leviable on a plaint under Art. 17, Schedule II of the Madras Court Fees Amendment Act, 1922. The right to apply to set aside the decision was conferred by section 84, clause (2). When we refer to Sch. II of the Madras Court Fees Amendment Act of 1922, we find there are articles numbered 17, 17-A and 17-B The first question that arises is whether "Art. 17" in the Madras Court Fees Amendment Act includes 17-A and 17-B, or, in other words, whether 17-A and 17-B are parts of Art. 17. On this point we are referred to a decision of our brothers, Phillips and Odgers, JJ., in *Godasankara Walia Rajah* v. *Board of Commissioners, Hindu Religious Endowments, Madras*[1] and as I respectfully differ from that decision, I think it is necessary to give my reasons at length.

When we refer to the practice of either the Imperial Parliament or the Imperial Legislature of India or the Local Legislatures, we find one definite rule of practice in numbering sections of enactments, this practice being to adopt the small letters

1. (1928) M.W.N. 509.

of the English alphabet (*a*), (*b*), (*c*), etc., to denote parts of a section, and if further sub-divisions are required, to use the Arabic numerals with or without brackets, but where a new section is required to be inserted between two sections and where they consider it desirable not to alter the number of the sections, they add the capital letters of the English alphabet A, B, C, etc., without brackets to the Arabic numerals. Thus if a new section is required between sections 17 and 18, they use 17-A, but if section 17 contains only one clause and requires another sub-section, they would number the old section as 17(*a*) and introduce a new sub-section 17 (*b*). The practice is so well established that it is impossible to imagine that any legislature is ignorant of it. I now proceed to give illustrations of this method of adding to enactments to show how conclusive it is against the view that clauses 17-A and 17-B can be parts of clause 17. In the Court Fees Act VII of 1870, the Imperial Legislature found it necessary to introduce a number of sections dealing with Court-fees relating to probate and letters of administration and certificates of administration. They found that these sections would properly come between sections 19 and 20. They therefore added sections 19-A to 19-K, these letters being added without any brackets. That these cannot be regarded as parts of section 19 is clear from the fact that they are so different in their nature from section 19 that the Legislature found it necessary to put them in a separate chapter and numbered the chapter as Chapter III-A. Now it cannot be suggested that Chap. III-A is part of Chapter III, for if the Legislature intended the new chapter to be part of the old and not a distinct chapter, all that they had to do was merely to add the sections to Chapter III with such method of numbering them as they liked but not to group all these new sections as an additional chapter. Thus we see that Chapter III-A and sections 19-A to 19-K cannot be parts of section 19. Exactly the same thing happened in the Indian Penal Code where sections 120-A and 120-B are added as parts of a new Chapter V-A and similarly sections 171-A to 171-I are added being made parts of a new Chapter IX-A. In the Criminal Procedure Code we have got Chapter XLIV-A consisting of sections 528-A to 528-D and in the Government of India Act of the Imperial Parliament we have got Part VI-A enacting section 84-A and other sections. In the above instances, it is not possible to say that the sections described by Arabic numerals with the capital letters are parts of the preceding

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sections described by the numerals only. Section 516-A of the Criminal Procedure Code is added in Chapter XLIII, whereas section 516 remains in Chapter XLII. This instance differs from the prior instances in the fact that whereas in the former group of instances a new chapter with new sections is added, in this case no new chapter is added but only a new section and we have got sections 516 and 516-A allotted to different chapters showing that 516-A is never thought of as part of 516. A similar example is that of section 129-A of the Government of India Act which is added to Part XII, whereas section 129 remains in Part XI. Coming to Madras Acts, in Act VI of 1922, the Act succeeding the one we are dealing with, section 7 says: "After section 19 the following shall be inserted, namely, section 19-A," the marginal note being "addition of a *new section* 19-A," and if the Statute Book of the Imperial Government from 1837 up to now is examined this is always found to be the practice, the description of the marginal note of such sections denoted by the addition of capital letters being that of new sections. As an example I may mention section 2 of Act XVI of 1919 which adds the new sections 11-A and 11-B to the Indian Naturalization Act of 1852. The marginal note is "insertion of new sections 11-A and 11-B." Where new sub-sections are intended to be added to a section, this method is not adopted, as for example, section 4 of Madras Act II of 1921 which amends the District Municipalities Act of 1920 and adds new sub-sections to section 368 of the main Act, the original section being re-numbered as sub-section (1) and sub-sections (2) to (5) being newly added. Such additions to a section are always described as sub-sections and not as new sections. The object of the method is to create new numerals between two consecutive numerals, which is merely a device of the Legislature intended not to disturb the numbering of the sections in the statute, so much so that sometimes where sections have been repealed, the numbers of the repealed sections remain unutilised and lower down a new section is added with the letters of the English alphabet. I am therefore clear that 17-A and 17-B cannot be regarded as part of 17 but only as new sections. From a perusal of the judgment of our brothers Phillips and Odgers, JJ., we are led to conclude that these considerations have not been relied on before them and secondly that, in some portions of the judgment, the capital letters A and B are referred to with brackets, as 17 (A) and 17 (B) which is not a correct description of the articles in

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question. I am not aware of any instance of bracketing the capital letters of the English alphabet in enactments. The first conclusion therefore I come to is that we should look at only Art. 17 of the Act. The learned Government Pleader referred to certain considerations such as the scheme of the Religious Endowments Act; of the scheme of the Court Fees Act, of the history of Arts. 17, 17-A and 17-B as compared with the old Art. 17 of the Court Fees Act of 1870. I do not see anything definite in these considerations to induce me to come to a different conclusion.

Now coming to Art. 17, all that we have got to do is to take the Court-fee mentioned in that Article and accept it as the Court-fee for an application under section 84 (2) of the Religious Endowments Act, for the schedule to the Religious Endowments Act does not require us to apply Art. 17 of the Madras Court Fees Amendment Act, but only requires us to take the Court-fee mentioned there and use that as the Court-fee for the application in question. Thus, in the first instance, we have not got to read the first column of Art. 17. In the first instance our business is only to take the third column and take the figure mentioned there. We have nothing to do with the discussion whether the description in the first column of Art. 17 is applicable to an application under section 84 (2). I have referred to this matter at this length because a good deal of argument has been addressed to us as to which description in the first column, that is whether the description in 17 or 17-A or 17-B, is best applicable to an application under section 84 (2). But it seems to me that this is an erroneous process. We have nothing to do with the description in the first column of Art. 17 or 17-A or 17-B. The argument was addressed to us with a view to induce us to hold that in this particular Amendment Act, Art. 17 includes Arts. 17-A and 17-B and that only by so holding we could get to some description in the first column applicable to the application in question. But as a matter of fact, we find none of the descriptions in the first column of Arts. 17, 17-A and 17-B is applicable to the application in question, because all these three Articles deal with a plaint or a memorandum of appeal, whereas we have got to do with an application and there is no section in the Religious Endowments Act saying that an application should be numbered as a suit as we find in the second schedule to the Civil Procedure Code relating to arbitration. *See*, for instance, cls. 17 (2) and 20 (2). Similar examples occur in other enactments, for

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example *see* section 83 of the Probate and Administration Act. We have nothing of the kind in the Religious Endowments Act.

While therefore holding that either Arts. 17 or 17-A or 17-B has not got to be examined to see which is properly applicable to an application under section 84 (2) and that mode of examining the articles cannot help us for purposes of showing that Art. 17 includes 17-A and 17-B, we find we have to look at the first column of Art. 17 for another reason. As I said we have got to take the figure in the third column of Art. 17 and if there is only one figure, there is no further question to be discussed. That figure represents the Court-fee for an application under section 84 (2). Unfortunately, we have got two figures in the third column of Art. 17, namely, Rs. 15 and Rs. 50. We have now to choose between these two figures and solely for the purpose of choosing between these two, I have got to examine the three varieties of suits described in the first column of Art. 17, not that any of them does apply to an application under section 84 (2)—for we know that none of them applies—but solely for purposes of making a choice between Rs. 15 and Rs. 50. However much the three clauses in the first column of Art. 17 are inapplicable, I look at them merely to see which comes nearest to the application in question. I am of opinion that Art. 17 (1) resembles the matter we are now concerned with. By this I do not mean that the description in Art. 17 (1) applies to the application we are dealing with. I refuse to discuss the question whether the word "Civil Courts" in Art. 17 (1) applies to the tribunal called the Board of Commissioners for Hindu Religious Endowments. While inclined to agree with the view expressed by my brother Venkatasubba Rao, J., in another case that "Civil Courts" there would include other and special tribunals in the land established by the Indian Legislature which are not Criminal or Revenue Courts, at present I simply refuse to discuss the question because the point is not whether any of the three sub-clauses of Art. 17 applies to the matter with which we are now concerned but which resembles it nearest. As I already said, I think Art. 17 (1) comes nearest. I therefore hold that Rs. 15 is the proper fee for all the petitions which have now come before us in the above Civil Revision Petitions. Each party will bear its own costs in the High Court.

Venkatasubba Rao, J.

Venkatasubba Rao, J.—I agree. The question to be decided is, in respect of an application under section 84 (2) of the

Madras Hindu Religious Endowments Act, what is the proper Court-fee payable? Section 84 reads thus:

"84. (1) If any dispute arises as to whether a math or temple is one to which this Act applies or as to whether a temple is an excepted temple, such disputes shall be decided by the Board

(2) A trustee affected by a decision under sub-section (1) may within one year apply to the Court to modify or set aside such decision but, subject to the result of such application, the order of the Board shall be final."

Under section 81. the proper fee for such an application is that set forth in Schedule II of the Act. Now turning to that Schedule, the material portion reads thus:

"84. (2) Application to modify or set aside the decision of the Board under sub-sec (1)	The fee leviable on a plaint under Art. 17, Sch II of the Madras Court Fees Amendment Act, 1922."

What we are called on to construe is the expression "Article 17" in the above column 3. The Madras Court Fees Amendment Act contains Arts. 17, 17-A and 17-B. The short question is, does the reference to Article 17 include 17-A and 17-B? My learned brother has fully set forth the numerous instances to which we have been referred, which show by their variety, that there is a well-recognised method of creating new numbers by affixing capital letters to pre-existing figures. Thus, new sections are inserted without disturbing the original arrangement, the object of the device being to avoid imposing a needless strain on a mind which has learnt to associate certain sections with certain numbers. If this be renumbered, 17-A and 17-B are in fact new figures and they can no more mean 17 than they can mean 18. The learned Government Pleader refers to the history of the section and says that 17, 17-A and 17-B of the Madras Act correspond to the original 17 of the Imperial Act. This, in my opinion, is quite beside the point. The reference in the Religious Endowments Act is to section 17 of the Madras Act. What does section 17 in that connection mean? I am clearly of the opinion that 17 does not include 17-A and 17-B.

For the petitioner it is contended that the Article applicable is 17 (1) which fixes a fee of Rs. 15. The Government contends on the other hand that the Article applicable is 17-A (1) or 17-B. What the Government Pleader says is this. You must look at the nature of the relief asked for in the application filed under section 84 (2) and then turn to the three Articles

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(17, 17-A and 17-B) to find out which of them applies. Under the terms of 84 (2), the aggrieved party is required to *apply* to the Court to modify or set aside the decision of the Board. It is impossible to hold that either 17-A (1) or 17-B deals in terms with such a relief. As a matter of fact, none of the three Articles, to which we have been referred, literally applies to an application of the kind with which we are dealing. We cannot therefore usefully apply the test suggested by the Government Pleader. That is a further reason for holding that we must confine our attention to the Article expressly indicated in the Schedule to the Religious Endowments Act and that Article is, as I have said, Article 17.

The learned Government Pleader strongly urges that the Legislature meant to include 17-A and 17-B. He may be right but it is our duty to gather the intention from the words employed and I must say that, if his contention is correct, apt language has not been used.

Then turning to 17, there are three sub-divisions, the second and third of them being utterly inapplicable. Then remains the first sub-division and we are driven to apply it, for the sole reason that it is the most reasonably appropriate part of the Article.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Venkataswami Naicker .. *Appellant** (*4th Defendant*)

v.

Palaniswami Chettiar *alias* Ponnuswami Chettiar and others .. *Respondents* (*Respondents* 1 *and* 2 *are plaintiffs and other respondents are defendants* 2, 5 *and* 3).

Venkataswami Naicker v. Palaniswami Chettiar.

Hindu Law—Joint family—Father—Mortgage by—Necessity—Business started by him with family funds and thereby becoming a family business—Alienation for carrying on—Validity against sons of

The father and manager of a joint Hindu family built a factory with joint family funds and started a ginning factory He ran the factory

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*Appeal No. 363 of 1926. 28th August, 1928.

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for a period of about two years, when, further materials being needed for the factory, he borrowed a sum of Rs. 10,000 on a mortgage of joint family property.

Held, that the mortgage was for family necessity and was binding on the sons of the executant.

A Hindu father, by starting a business with the aid of family funds, can make that a family business. In such a case, an alienation made by the father for raising funds for carrying on that business is binding upon his sons on the ground that it was for legal necessity.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O.S. No. 11 of 1924.

T. R. Ramachandra Aiyar and *K. S. Venkatarama Aiyar* for appellant.

T. M. Krishnaswami Aiyar and *T. B. Balagopal* for respondents.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—This appeal arises out of a suit to recover a sum of Rs. 63,000 and odd due to the plaintiffs on a mortgage bond, dated 26th March 1920 (Ex. A), executed by the 1st defendant. Defendants 2, 3 and 4 are the sons of the 1st defendant. The 5th defendant is the Official Receiver of Coimbatore representing the 1st defendant who has become an insolvent. The Court below gave a decree as prayed for. The 4th defendant alone appeals. Ramesam, J.

The deed of mortgage, Ex. A, was executed for Rs. 40,000 consisting of Rs. 30,000 borrowed for the purpose of paying the branch of the Madras Bank at Coimbatore and Rs. 10,000 received at the time of registration. The learned vakil for the appellant argued that neither of the items is binding on the 4th defendant so as to form consideration for a mortgage. Taking the first item of Rs. 30,000, the existence of the prior debt to the Bank of Madras at Coimbatore and the payment of Rs. 15,000 by the 1st plaintiff and another Rs. 15,000 by the 2nd plaintiff on the 30th March, 1920 to the Bank of Madras in diminution of the debt of the 1st defendant is proved by Ex. D, the account of the Bank and also Exs. B, B-1, C, C-1, chalan and receipt for each payment. The learned vakil for the appellant contends that the 1st defendant was speculating and the debt of the Bank was in connection with some other person as security. Ex. D shows that it was his own debt. The 1st defendant says as D.W. 1 that Rs. 30,000 was for money due on a promissory note debt negotiated by himself and drawn by his brothers-in-law in his favour. Whatever the origin of it may be, Ex. D shows it was his own debt and it is binding on him.

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Ramesam, J.

We now come to the second item of Rs. 10,000 as to which it appeared at first that the appellant had got a better case than the other item. The facts relating to this item and bearing on the history of the family may be stated as follows. The 1st defendant's family was a money-lending family from the time of his grandfather. They had a Bank called Rukmani Vilas which ceased to work some years ago. Some time about 1917-18 the family started a ginning factory at Ondiputhur. Originally the 1st defendant intended to take other partners and he took from the 2nd plaintiff Rs. 1,000 towards his share of the capital and other amounts from the other intended partners. Ultimately he retained the factory entirely for himself and returned the amounts collected from the other intended partners. But in the case of the 2nd plaintiff he lent a pair of ear-rings to him (2nd plaintiff) and afterwards, according to the 2nd plaintiff, asked him to take the ear-rings towards the amount, paid for the 2nd plaintiff's share of the capital of the partnership. The 1st defendant says nothing about Rs 1,000 owing to the 2nd plaintiff but merely says that the price of the ear-rings is still due to him. In the matter of the ear-rings the Subordinate Judge believed the 2nd plaintiff's evidence and we see no reason to differ from him. Then in 1920 Rs. 10,000 was borrowed under the suit mortgage bond for the needs of the ginning factory. The 2nd plaintiff says, "They wasted the balance for the needs of a ginning factory which their family was running." I take this to mean that the ginning factory had been started some time before the borrowing of Rs. 10,000 The 1st defendant does not give any definite evidence as to when the factory was started. According to the statement made by the 2nd plaintiff (P. W. 1) in cross-examination, it must have been started in 1917-18. Now it is contended before us by the learned vakil for the appellant that the cotton trade was not an ancestral business and therefore money borrowed for the ginning factory is not binding on the 4th defendant. Incidentally I may observe that defendants 2 and 3 who were majors at the time of the execution of Ex A not only attested the document but afterwards executed Exs. E and F, admitting their liabilities under Ex. A The 4th defendant happened to be a minor not only in 1920 but up to 1923. It is true that the family had no cotton trade before the time of the 1st defendant and that the trade was started by him for the first time. There is no principle in Hindu Law prohibiting a person from starting any trade he likes. If the trade which a person who is the

manager of a family is carrying on can be regarded as an ancestral trade, it will be binding not only on his sons but also on his brothers and other collaterals; but if the trade is not an ancestral trade in his hands but a trade started for the first time by himself it will not be binding on his brothers and other collaterals though he is the manager of a joint family unless perhaps it can be shown to have been profitable at least for some time and that the collaterals have participated in such profits; but as against his sons certainly it is an ancestral trade in the sense that the father is an ancestor though it is not an ancestral trade in the hands of the father himself. Whether one may call it ancestral or not the debt borrowed for the needs of the trade cannot stand in a worse position than any other debt contracted by the father which is not illegal or immoral in the matter of its binding the sons. From the point of view of the sons' liability I do not see what difference it makes whether it is a trade started by their father or a trade started by their grandfather. Mr. Ramachandra Aiyar contends, while conceding that such trade debts may be binding on the sons as mere money debts, that they will not form proper consideration for a mortgage or sale. But that question depends simply upon whether there was an antecedent debt or necessity at the time of the mortgage. Now if there is family trade carried on by the father for the benefit of himself and his children and in the course of the family trade he finds that he is in need of money for meeting the purposes of the trade, I do not see why a debt borrowed on mortgage should not be regarded as a debt for necessity. Here we find that the ginning factory was started some time in 1917-18 and it was going on up to 1920. The presumption is that it was going on as family trade for the benefit of the whole family just as property acquired by a member of the family, particularly the father or manager, will be presumed to be property purchased on behalf of the joint family where the family had a nucleus of ancestral property and it is for members who claim it to be self-acquired property to show that it is self-acquired. Similarly where the father builds a factory for ginning and other evidence shows that the father was in possession of ancestral property (here we have got evidence that the family had lands annually yielding Rs. 8,000) the presumption would be that the factory was built with joint family funds, and it is for those who want to assert that it has nothing to do with the joint family to prove that the factory was erected by means unconnected with the joint family. There

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is no such evidence here. Thus we start with the position that the family had run a ginning factory with the joint family funds from 1918 to 1920. In 1920 further materials were needed for the factory. The father then borrowed Rs. 10,000 from the plaintiffs. Coimbatore is a cotton-growing district. Cotton trade is a legitimate trade for trading families in that district. We cannot say that building a ginning factory was of such speculative kind that money borrowed later on for its needs should not be regarded as for necessity from the point of view of the sons. I am therefore of opinion that there was a family necessity in 1920, supporting the mortgage, Ex. A. This is the view I took *In the matter of Radhakrishniah Chetty.*[1] In that case I merely expressed an opinion to this effect on the first point and stated it was unnecessary for me to give a decided opinion having regard to my decision on the second point. However it is necessary here to decide the point and I adhere to the opinion I then expressed. I think the mortgage is binding on the 4th defendant also. It is clear that every member of the family *sui juris* thought at the time that it was a good venture and they were going to be profited by it.

The result is, the appeal fails and is dismissed with costs.

Venkatasubba Rao, J.

Venkatasubba Rao, J.—This is a suit on a mortgage executed by the 1st defendant. Defendants 2, 3 and 4 are his sons. When the mortgage was executed, defendants 2 and 3 were adults and approved of the transaction. To indicate their consent, they attested the mortgage deed in the first place and subsequently passed two documents in which their approval was expressed. The 4th defendant was a minor and is the appellant before us. He contends that the mortgage is not binding on his interest in the property.

The mortgage was executed on the 26th of March, 1920 for securing repayment of Rs. 40,000 advanced to the 1st defendant. In order to make it binding on the other members of the family, it must be shown, either that there were antecedent debts, not illegal, or immoral, or, that there was legal necessity. To the extent of Rs. 30,000 the appellant has clearly no case, for, it is beyond doubt that there were antecedent debts amounting to that sum and that the money was utilised for discharging those debts. As regards the balance of Rs. 10,000 the alienation is supported on the ground that there was legal necessity. The family of the defendants was a

1. (1924) 9 L.W. 415 at 417.

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Venkata-subba Rao, J.

wealthy one. It owned lands yielding an annual income of about Rs. 6,000 and there was an ancestral business which consisted of money-lending on a large scale. The 1st defendant deposes that when he assumed the management, the family had dealings in money-lending to the extent of about Rs. 70,000. About the year 1917, the 1st defendant built a ginning factory and started a trade in cotton. This was not an ancestral trade and the case must be decided upon the footing that it was started for the first time by the 1st defendant. Money was required in connection with this trade and the sum of Rs. 10,000 referred to above was borrowed for the needs of this business. It is contended for the appellant that the needs of the trade started by the 1st defendant cannot be regarded as the needs of the family and the purpose is therefore not, what may be described, as legal necessity, under the Hindu Law. The contention is broadly, that a Hindu father governed by the Mitakshara Law can only carry on an inherited business, but can, on no account, commence a new trade, in the sense that it can become a family concern and that its debts are binding upon his sons. I cannot assent to this proposition. In *Rajagopal Pillai* v. *Veeraperumal Pillai*[2] I expressed the opinion that this is not a sound proposition, though it did not become necessary to give a ruling on the point (*see* pp. 239 and 240). That a son is liable under the pious obligation for his father's trade debts is, I think, a proposition that hardly admits of doubt (*see* the same case). But when the creditor is trying to support an alienation, the question is not: is the son under a pious duty to pay the debt? But it arises in a different form; was the debt incurred for family necessity or benefit? If the carrying on of the trade can constitute a legal necessity or family benefit, the debt must be held binding on the sons. It is agreed on all hands that if a debt is borrowed for an ancestral trade, it is binding on the sons. Does it then make any difference that it is not such a debt? In many decisions, an ancestral trade was differentiated from a trade started for the first time by a manager of the family. There has been a great diversity of opinion on the point. Not only have the views been conflicting, but even the reasons given in support of each view have not been uniform. But it is noticeable that these cases relate to the powers of a manager other than a father. In the case of such a manager, in some cases, it has been held that he

2. (1927) 53 M.L.J. 232.

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cannot for the first time start a trade; in others that to do so is within his competence. I may illustrate the extreme conflict of views by citing two cases. In *Krishnadhan Banerji* v. *Sanyasi Charan*[3] it was held that it was beyond the powers of a *karta* (in this case the eldest brother) not only to embark on a new trade but even to extend and enlarge a previously existing ancestral trade. I must point out that this extreme view has not received much support. The very opposite of this view was taken in *Malaiperumal Chettiar* v. *Arunachala Chettiar*[4] where Sadasiva Aiyar, J. (Ayling, J., concurring) held that there is no distinction in principle between an ancestral trade carried on by a father and a joint family trade began for the first time either by the father or by the elder brother. How varied and diverse between these two extremes the opinions on this point are, may be seen from the judgments in the following cases:

Narayana Sah v. *Sankara Sah,*[5] *Thammireddi* v. *Gangireddi,*[6] *Abdur Rahman Kutti Haji* v. *Hussain Kunhi Haji,*[7] *Lakshmiah* v. *The Official Assignee of Madras*[8] and *D. McLaren Morrison* v. *S. Verschoyle.*[9]

Turning to the decisions of the Judicial Committee, *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[10] and *Sadasiva Mudaliar* v. *Hajee Fakeer Mahomed Sait & Sons*[11] seem to support the view that the manager's powers are limited, whereas *Niamat Rai* v. *Din Dayal*[12] seems to recognise that his powers are most extensive. The words in the judgment of their Lordships in the last-mentioned case at p. 216 "even if there had been no joint family business" are relevant in this connection. Whatever may be the state of the law, in regard to the powers in this respect, of a manager generally, I find no case in which the father's power has been so restricted. Under the Hindu Law the father stands in certain respects on a footing different from that of an ordinary manager. I am not prepared to hold that in regard to this power respecting alienations he is under the same disability with reference to trade debts as other managers are. In *The*

3 (1919) 51 I.C. 597. 4 (1917) 6 L.W. 417.
5. (1926) 51 M L.J 621
6. (1921) I.L R. 45 M 281· 42 M L J. 570.
7 (1919) I.L.R. 42 M 761· 37 M.L.J. 316.
8. (1928) M.W N. 576 9 (1901) 6 C.W N. 429 at 457, 458
10. (1922) L R. 49 I.A. 108. I.L.R. 49 C 560 43 M L J. 41 (P.C.)
11 (1922) 44 M.L.J. 396 (P C.).
12. (1927) L.R. 54 I.A. 211: 52 M.L.J. 729 (P.C).

Official Assignee of Madras v. *Palaniappa Chetti*[13] Sadasiva Aiyar, J., observed that the right of a Hindu father belonging to a trading community to begin a lawful trade as a joint family business cannot be disputed. In *In the matter of Radhakrishniah Chetti*[1] my learned brother made an observation almost to the same effect that it is open to a Hindu father to start a new family business. In *Mahabir Prasad Misr* v. *Amla Prasad Rai*[14] a mortgage by a Hindu father to secure moneys borrowed for a trade, which was not an ancestral one, was held binding on the sons.

I am of the opinion that a Hindu father, by starting a business with the aid of family funds, can make that a family business. In such a case, an alienation made by the father, for raising funds for carrying on that business, is binding upon the son, on the ground that it was for legal necessity.

In the view I take, it would make no difference whether the moneys are borrowed for starting a new trade with the aid of joint family funds, or for carrying on a trade which had been already so started.

I agree that the appeal fails and should be dismissed with costs.

A.S.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

A. Mahalinga Kudumban and others .. *Appellants** (*Claimants*)

v.

Theetharappa Mudaliar .. *Respondent* (*23rd Claimant*).

Land Acquisition Act (I of 1894), Ss. 30 and 54—Reference under S 30—Decision of Court on the reference—If an award—Appeal—Civil Procedure Code, Ss 2 (2) and 96—Decree—Forum of appeal—Court Fees Act, S 8 and Sch. I, Art. 1—Court-fee payable on the appeal

The decision of a Court as to the rights of the contending parties on a reference under S 30 of the Land Acquisition Act is not an "award" within the meaning of S. 54 of the Act and consequently an appeal does not lie to the High Court from such a decision under S. 54; but, such a decision is a "decree" within the meaning of S. 2 (2) of the Civil Procedure Code and an appeal lies from it under S. 96 of the same Code which is made applicable to proceedings under the Land Acquisition Act.

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*S.R. Nos. 7968, 7971 and 7974 of 1927. 29th February, 1928.

1. (1924) 19 L.W. 445.

13. (1918) I.L.R. 41 M. 824: 35 M.L.J. 473 (F.B.).

14. (1924) I.L.R. 46 A. 364.

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As the appeal is under the Civil Procedure Code and not under the Land Acquisition Act, the forum of the appeal from such a decision of a Subordinate Judge will not always be the High Court but will depend upon the amount involved in the appeal.

Ramachandra Rao v. *Ramachandra Rao*, (1922) L.R. 49 I.A. 129 I.L.R. 45 Mad. 320: 43 M.L.J. 78 (P C) referred to.

The Court-fee payable in such an appeal is the *ad valorem* fee under Art. 1 of Sch. I of the Court Fees Act. S. 8 of the Act does not apply to such an appeal.

Appeals sought to be preferred against the orders of the Court of the Subordinate Judge of Tuticorin, dated 21st December, 1926, in C.R. Nos. 5 of 1925, 8 of 1926 and 14 of 1925.

V. Narayanan for appellants.

S. Muthiah Mudaliar for respondent.

The Government Pleader on behalf of the Government.

The judgment of the Court was delivered by

Devadoss, J.

Devadoss, J.—These appeals arise out of Land Acquisition proceedings in the Tinnevelly District. Some inam lands were acquired under the Land Acquisition Act and the Land Acquisition Officer passed an award and referred to the Civil Court under section 30 the claims of the contending parties. The inamdar alleges that he is entitled to the land and not to the *melwaram* only and claims the whole of the award. A number of tenants, alleging that they have occupancy right in the land acquired, claim a portion of the amount awarded as compensation. The Subordinate Judge, Tuticorin, held that the tenants had no occupancy right in the land and that the whole of the amount of compensation should be paid to the Inamdar. The tenants have preferred these appeals. The Office asked for directions from the Admission Court as regards the amount of Court-fee payable on the Memorandum of Appeal in each case and as regards the maintainability of the appeals in the High Court. One of us sitting in the Admission Court ordered notice to the Government Pleader and to the respondent and directed that the appeals be posted before a Bench of two Judges as the questions raised were of general importance. Mr. Muthiah Mudaliar who appears for the respondent raises the further point, that no appeal lies against the order of the Subordinate Judge.

Three questions arise for decision:

(1) Does an appeal lie against the order of the Subordinate Judge?

(2) If it does, to what Court should the appeal be presented?

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(3) What is the amount of Court-fee payable on the Memorandum of Appeal?

Question 1.—Section 54 of the Land Acquisition Act of 1894 provides for an appeal to the High Court from the award or any part of the award of the Court in any proceedings under this Act. In *Rangoon Botatoung Company, Ltd.* v. *The Collector, Rangoon*[1] their Lordships of the Privy Council held that no appeal lay to His Majesty in Council from a decision of the Chief Court of Lower Burma on a reference to that Court by the Collector of Rangoon in proceedings under the Land Acquisition Act. Lord Macnaghten in delivering the judgment of the Privy Council observes:

> "A right of appeal from any decision of any tribunal must be given by express enactment. A special and limited appeal is given by the Land Acquisition Act from the award of the 'Court' to the High Court. No further right of appeal is given."

The principle of the Privy Council decision is that an award is made by the Land Acquisition Officer as an arbitrator and an appeal would lie against the award as provided by the Act and no further. A party who objects to the award may ask the Land Acquisition Officer to make a reference to the Court under section 18 and the Court may, for sufficient reasons, increase the award and the amount awarded by the Court becomes the award and an appeal will lie against such award under section 54. In order to give the right of appeal to the Privy Council, Act XIX of 1921 was passed adding a subsection to section 26 and amending section 54 of the Land Acquisition Act of 1894. Clause (2) added to section 26 says:

> "Every such award shall be deemed to be a decree and the statement of the grounds of every such award, a judgment within the meaning of section 2, clause (2) and section 2, clause (9) respectively of the Code of Civil Procedure."

This amendment does not help the appellant as a decision in a reference under section 30 is not an award within the meaning of section 54. The decision of a Court as to the rights of the contending parties on a reference under section 30 cannot be said to be an award under the Act. After the award has been made the Court determines who are entitled to the whole or a portion of the award. As section 54 is not applicable to the present case, we have to see whether an appeal does lie under any other provision of law. It is urged by Mr. Muthiah Mudaliar that an appeal is a creature of the statute and unless

1. (1912) L.R. 39 I.A. 197: I.L.R. 40 C. 21: 23 M.L.J. 276 (P.C.).

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the statute expressly gives it, an appeal would not be competent merely by reason of the provisions of the Civil Procedure Code being followed by the Court in all proceedings on a reference by the Land Acquisition Officer. When the claims of the contending parties are determined by the Court that decision is binding on them and no suit will lie to set it aside. In *Bhandi Singh* v. *Ramadhin Roy*[2] some persons who were parties to Land Acquisition proceedings asked for a reference under section 18 of the Act. They did not appear at the hearing of the same and it was struck off. It was held that a suit instituted by the same persons in the Civil Court for the apportionment of the compensation money was barred by sections 102 and 103, Civil Procedure Code. Mookerjee, J., observes at p. 999:

> "The party at whose instance the reference is made under section 18 is virtually the plaintiff and if the objection relates to the measurement of the land and the amount of the compensation, the Collector is the defendant,"

and further observes that as these parties were absent it was rightly dismissed. In *Ramachandra Rao* v. *Ramachandra Rao*[3] the Privy Council held that a decision of a Civil Court as to title on a reference to it under the Land Acquisition Act was *res judicata* in subsequent proceedings. They held that the decision in such cases was not an award and disapproved of the decisions in *Srimati Trinayani Dassy* v. *Krishna Lal Dey*[4] and *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra.*[5] Their Lordships observe at page 330:

> "From the moment when the sum has been deposited in Court under section 31, sub-section (2), the functions of the award have ceased; and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award, and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal which would be wholly taken away when the piece of land was represented by a sum of money paid into Court,"

and they further observe that

> "if the decision was wrong, it ought to have been appealed from in due time"

When there is a litigation in Court in which the civil rights of parties are determined, such litigation, though not called a suit, yet is a civil proceeding and as the Civil Procedure Code is made applicable to such proceeding, unless the right of appeal given

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2. (1905) 10 C.W.N. 991.
3. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C).
4. (1912) 17 C.W.N. 935.
5. (1896) I.L.R. 23 C 526.

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under the Civil Procedure Code is taken away expressly it cannot be held that the right of appeal does not exist.

Another argument in favour of the appellant is that the term "decree" is applicable to the decision of the Court on the rights of the contending parties and therefore an appeal lies against the decision under section 96, Civil Procedure Code. The "decree" according to the Civil Procedure Code means "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." It is urged for the respondent that there must be a suit so that the definition of the word "decree" may be applied to Land Acquisition Proceedings. The word "suit" is not defined in the Code and it is difficult to see why the word should not be applied to any contentious proceeding in a Civil Court in which the rights of parties are in question and in which the Court is asked to determine them. In *Hurro Chunder Roy Chowdhry* v. *Sooradhonnee Debia*[6] Sir Barnes Peacock observes:

"The word 'suit' does not necessarily mean an action, nor do the words 'cause of action' and 'defendant' necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit, the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action"

In this case, the Subordinate Judge has decided that the amount is payable only to the respondent and not to the appellants. The appellants' claim to a portion of the award is a civil right and the Subordinate Judge has given a decision affecting their right. Such a decision is a decree within the meaning of section 2, clause (2) of the Civil Procedure Code. If it is a decree, then an appeal lies under section 96, Civil Procedure Code.

Apart from the question whether the decision of the Subordinate Judge amounts to a decree or not, when proceedings are before a Civil Court such proceedings are governed by the usual procedure applicable to such Court. References under section 30 are to the Court and therefore the right of appeal given by section 96, Civil Procedure Code, unless expressly taken away, would attach to them and S. 53 which makes the Civil

6. (1868) Beng. L.R. Suppl. Vol. 985 at 990.

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Procedure Code applicable to proceedings before Courts does not take away the right under the Civil Procedure Code. The law on this point is clearly laid down by Lord Haldane in *The National Telephone Co., Ltd.* v. *Postmaster-General*[7]:

> "When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches."

In this connection a reference may be made to *Parthasaradhi Naidu* v. *Koteswara Rao*,[8] where a Full Bench of this Court held that the High Court could entertain an application under section 115 against the decision of a District Judge in an election matter. Under section 57 of the Local Boards Act XIV of 1920 a District Judge is empowered to determine whether a member is disqualified or not under section 55 or 56. Under clause (2) the decision of the District Judge is final. Notwithstanding this clause the Full Bench held that inasmuch as the District Judge was competent to entertain and hear objections under section 27, the High Court could revise his order under section 115, Civil Procedure Code. The argument that "District Judge" was *persona designata* did not find favour with the Full Bench. The reference under the Land Acquisition Act is to the "Court" and the word "Court" is defined as "the Principal Civil Court of Original Jurisdiction, unless the Local Government has appointed some other officer to do the work." We hold that an appeal is competent against the order of the Subordinate Judge.

Question 2.—The amount involved in these appeals is less than Rs. 3,000 and an appeal therefore under the Madras Civil Courts Act lies to the District Court as the amount does not exceed Rs. 5,000. It is urged that section 54 provides for an appeal to the High Court and the amended section makes it clear that an appeal can only lie to the High Court. As we have held that the appeal is not under section 54 of the Land Acquisition Act, this argument is of no avail. If the appeal is against the award, that is against the amount of the award, no doubt an appeal would lie to the High Court. But we are satisfied that it is not an appeal against the award, but it is only against an order determining the civil rights of two sets of contending parties. It was only recently that Subordinate Judges were invested with jurisdiction under the Land Acquisition Act and at the time when the amending Act was passed Subordinate Judges in this

7. (1913) A.C 546 at 552

8. (1923) I.L.R. 47 M. 369: 46 M.L.J. 201 (F.B.).

Presidency were not invested with jurisdiction under the Act, and that may very probably have been the reason for leaving the appeal to the High Court from the District Court untouched. As we hold that the order of the Subordinate Judge is a decree in Civil Proceedings, the appeal must lie to the District Judge, as the amount involved is less than Rs. 5,000.

Question 3.—The amount of Court-fee has to be determined with reference to the Court Fees Act. Section 8 cannot apply to this case as this is not an appeal against an award. Section 8 refers specifically to the amount awarded to and the amount claimed by the appellant. There is no dispute here as regards the amount of compensation awarded. Section 8 can only apply to cases where the claimant claims more than the amount awarded by the Lower Court. If section 8 is not applicable, the only other provision of the Court Fees Act applicable to a case like this is Art. 1 of the first schedule, namely, "Plaint or Memorandum of Appeal (not otherwise provided for in this Act)." There is no specific provision as regards appeals in such cases as these and therefore the Court-fee payable is the *ad valorem* fee. It has been the practice of this Court to demand *ad valorem* fee in appeals under the Land Acquisition Act and the practice is the same in the Allahabad High Court as is clear from *Sheo Rattan Rai* v. *Mohri*.[9] *See* also *Shrimati Trinayani Dasi* v. *Krishna Lal De*.[10]

In the result, these appeals will be returned to the appellants for presentation to the proper Court and one month's time will be allowed for paying the necessary Court-fee. No order as to costs.

N.S. *Appeals returned for presentation to proper Court.*

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9. (1899) I.L.R. 21 A. 354. 10. (1912) I.L.R. 39 C. 906.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Kattiya Pillai *alias* Sernthaya Pillai and another .. *Petitioners** (*Defts.*)

v.

Ramaswamia Pillai (insane) by wife and next friend, the 2nd respondent and two others .. *Respondents* (*Plffs.—Defts.*).

Kattiya Pillai v. Ramaswamia Pillai.

Civil Procedure Code (V of 1908), S 115—Order relating to question of Court-fee—If and when revisable—Order relating to question of Court-fee and valuation for purposes of jurisdiction—Revision—Court Fees Act, Ss. 7 (iv) (a) and 7 (iv) (c) and Sch. II, Art. 17-A (1)—Suit for a declaration that a will is a forgery and for cancellation of the will and the Sub-Registrar's order registering the will—Court-fee payable—Substance and not form of prayer to be regarded—Valuation for jurisdiction—Suits Valuation Act, S. 11—Effect of.

The High Court can interfere in revision against an order relating only to a question of Court-fee, if the order is unfavourable to the plaintiff; but it will not interfere, if the order is favourable to the plaintiff. Where, however, the question is not only one of Court-fee but also of jurisdiction, the High Court can interfere in revision, even though the order is favourable to the plaintiff. S. 11 of the Suits Valuation Act does not exclude the revisional jurisdiction of the High Court in such a case; this section has only the effect of curing the defect after a mistake in regard to jurisdiction is committed and does not say that a superior Court has no power to prevent beforehand a mistake from being committed

Atchayya v. *Sri Seetharamachandra Rao,* (1912) I.L.R. 39 Mad. 195: 24 M.L.J. 112 (F.B.) followed.

The proper Court-fee payable in a suit for a declaration that a will is a forgery and for the cancellation of the will and the order of the Sub-Registrar registering the will is that specified in Sch. II, Art. 17-A (1) of the Court Fees Act and not that specified in S. 7 (iv) (a) or S. 7 (iv) (c), as the prayers for the cancellation of the will and the cancellation of the order of the Sub-Registrar are not consequential reliefs but are unnecessary and superfluous, the Court being bound under S. 39 of the Specific Relief Act, when it finds that the will is void, to order the cancellation of the will and send a copy of its decree to the Registration Officer who shall note in his book that the instrument has been cancelled The plaintiff in such a suit cannot value it for the purpose of jurisdiction by placing an arbitrary value upon the relief he claims but he is bound to assess it according to the market value of his interest in the properties in question.

Per Venkatasubba Rao, J—In deciding what the proper Court-fee payable is, the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High

*C.R.P. No. 948 of 1927. 10th January, 1929.

Court to revise the order, dated 18th July, 1927 of the Court of the Subordinate Judge of Tuticorin in C.M.A. No. 4 of 1927 against the order of the Court of the District Munsif of Srivaikuntam, dated the 1st October, 1926 and made in O.S. No. 520 of 1925.

Kattiya Pillai v. Ramaswamia Pillai.

A. Swaminatha Aiyar for petitioners.

K. R. Rama Aiyar for respondents.

The Court delivered the following

JUDGMENTS. *Venkatasubba Rao, J.*—The question to be decided is, has the suit been properly valued for the purposes of jurisdiction? The suit has been filed in the Court of the District Munsif and the defendants object that it is not the proper Court and the Court having jurisdiction is the Sub-Court. The facts of the case are that the plaintiff, the 1st, the 2nd and the 3rd defendants are sons of one Perumal Pillai. The 1st and 2nd defendants, it is said, have put forward a will which is alleged to be that of their father. The plaintiff says that this will is a forgery and that there are previous wills which confer upon him a larger benefit. He prays in his plaint, first, that the will may be declared to be a forgery; secondly, that the will may be cancelled; and thirdly, that the order of the Sub-Registrar registering the will may also be cancelled I may mention that it is alleged by the plaintiff that he and the 3rd defendant are in possession of the property. The District Munsif has held that he had no jurisdiction and directed the plaint to be presented to the proper Court. The learned Subordinate Judge set aside this order and holding that the Munsif's Court had jurisdiction remanded the suit to that Court for being disposed of according to law.

Venkatasubba Rao, J.

A preliminary objection has been taken that no revision petition lies. Where the order complained against relates only to a question of Court-fee, it has been held that the High Court can interfere in revision if the Lower Court's order is unfavourable to the plaintiff. *Venkataramani Aiyar* v. *Narayanaswami Aiyar*[1] and *Karuppanna Tevar* v. *Angammal*[2] and *Kulandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*.[3] It has also been held that, if the order is favourable to the plaintiff, the High Court does not interfere with that order in the exercise of its powers of

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1. (1924) 48 M.L.J. 688. 2. (1926) 51 M.L.J. 67.
3. (1927) I.L.R. 51 M. 664: 55 M.L.J. 345.

Kattiya Pillai v. Ramaswamia Pillai.

Venkatasubba Rao, J.

revision. (*Muhammad Elliyar* v. *Rahim Bee*, C.R.P. No. 1172 of 1927). In this case, dealing first with the question of Court-fee, the defendants say that a larger Court-fee is payable than what the Subordinate Judge has held is the proper fee. If the question is therefore one relating to Court-fee alone, I should refuse following C.R.P. No. 1172 of 1927, to set aside the order in the exercise of our revisional powers. In this case, the question is not only one of Court-fee but also of jurisdiction. The learned Advocate for the respondents argues that our revisional jurisdiction is excluded by *section* 11 *of the Suits Valuation Act.* I cannot agree with this contention. That section has the effect of curing the defect after a mistake in regard to jurisdiction is committed; it certainly does not say that a superior Court has no power to prevent beforehand a mistake from being committed. The learned Advocate relies upon *Raman* v. *Secretary of State for India in Council,*[4] which has no bearing on the powers of revision. Under S. 115 of the Code of Civil Procedure there can be no doubt that we can interfere in a case of this kind; it is certainly our duty to prevent a wrong assumption of jurisdiction by Courts subordinate to us. The question is now settled by authority. *Atchayya* v. *Sri Seetharamachandra Rao*[5] is a case on all fours and the preliminary objection is overruled.

In regard to the Court-fee payable, what is the proper provision applicable? It is first suggested that section 7 (iv) (*a*) of the Court Fees Act applies. It is obvious that it does not, as the suit is not for a relief coming within that section. The will sought to be cancelled is clearly not a document securing money or property having money value.

Next, it is suggested that section 7 (iv) (*c*) is the section applicable. It applies if the relief asked for is declaratory decree *plus* consequential relief. In this case can it be said that the plaint prays for any consequential relief? Section 39 of the Specific Relief Act enacts that any person against whom a written instrument is void or voidable may sue to have it adjudged accordingly. The present suit is a suit of this description. The plaintiff asks that the will may be declared void. That section further enacts that in such a suit the Court may, in its discretion, adjudge the instrument void or voidable and order it to be delivered up and cancelled. In a suit rightly framed under that

4. (1901) I.L.R. 24 M. 427: 11 M.L.J. 315.
5. (1912) I.L.R. 39 M. 195: 24 M.L.J. 112 (F.B.).

section, it is the Court's function to order the instrument to be cancelled; it is not a part of the prayer in the plaint. Then again, the section goes on to say that if the instrument is one that has been registered under the Registration Act, the Court shall send a copy of its decree to the Registration Officer, who shall note in his book that the instrument has been so cancelled. This again, is not a relief which it is the duty of the plaintiff to sue for, but is the duty of the Court to grant. Now, looking at the present plaint, it is thus clear that the prayer relating to (1) the cancellation of the will, and (2) the cancellation of the registration is unnecessary and superfluous.

In deciding what the proper Court-fee payable is, the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for. *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon*[6] and *Venkataramani Aiyar* v. *Narayanaswami Aiyar.*[1] Then again, is it obligatory upon the plaintiff to have the will set aside? For instance, if a person, who feels aggrieved by a will, sues for recovery of immoveable property covered by it which happens to be in the possession of a third party, claiming the property on the strength of the will, can it be successfully contended that such a suit is governed not by the ordinary 12 years period but that the plaintiff is first bound to get the will set aside within the shorter period provided by Art. 91 of the Limitation Act. Such a contention cannot prevail. I am clearly therefore of the opinion that section 7 (iv) (*c*) does not apply.

The provision that is therefore applicable is Schedule II, 17-A (1) which applies to a suit "to obtain a declaratory decree where no consequential relief is prayed."

If this is the correct view on the question of Court-fee, how is the suit to be valued for the purpose of jurisdiction? It has been held that in such a case it is not open to the plaintiff to place an arbitrary value upon the relief he claims, but that he is bound to assess it, according to the market value of his interest in the properties in question. *Venkatachalam Pillai* v. *Srinivasa Aiyar,*[7] *Rattayya* v. *Brahmayya*[8] and *Vasireddi Veeramma* v. *Butchayya.*[9] In this what is the value of the interest that would be lost to the plaintiff if the will is left outstanding? That would be the difference between the benefit he takes under the

1. (1924) 48 M.L.J. 688. 6 (1906) I.L.R. 30 M. 18.
7. (1923) 18 L.W. 399. 8. (1925) 49 M.L.J. 309.
9. (1926) I.L.R. 50 M. 646 · 52 M.L.J. 381.

Kattiya Pillai v. Ramaswamia Pillai. — Venkatasubba Rao, J.

previous will relied on by him and the will he attacks in this suit. If this be so, it is not disputed that the value of the suit would be far in excess of the pecuniary jurisdiction of the District Munsif's Court. I therefore set aside the order of the Lower Court and direct the plaint to be sent to the District Munsif's Court for being returned by that Court to the plaintiff for presentation to the proper Court.

Each party shall bear his costs of this revision petition.

Reilly, J.

Reilly, J.—I agree that the preliminary objection that this petition is barred by section 11 of the Suits Valuation Act cannot be upheld. In this petition we are asked to revise the order of the Subordinate Judge. It cannot be said that the Subordinate Judge in this case, when he was hearing the appeal before him, exercised on account of any over-valuation or under-valuation a jurisdiction which he had not got He was bound to hear the appeal before him. Defendants 1 and 2, who are the petitioners here, want to escape by this petition the disposal of suit by a Court which has no jurisdiction. So far as the further objection goes, that we cannot interfere in revision under section 115 of the Code of Civil Procedure with an order such as that made by the learned Subordinate Judge, that is concluded by the opinion of the Full Bench in *Atchayya* v. *Seetharamachandra Rao.*[5]

On the main question it cannot be disputed, and I did not understand Mr. Rama Aiyar for the plaintiffs seriously to dispute, that the plaintiffs could have brought their suit solely for a declaration that the will was not genuine. What I understood Mr. Rama Aiyar to contend was that his clients were at liberty to add prayers for further relief, for cancellation of the document and for an order to the Registration Department, and those reliefs he represented as consequential reliefs which would bring the suit within section 7 (iv) (*c*) of the Court Fees Act. If the suit could have been brought legally for the declaration alone, then I think it is clear that those further reliefs, even if they could be prayed for, would not be consequential reliefs within the meaning of section 7 (iv) (*c*). If they were consequential reliefs within that meaning, then it is obvious that section 42 of the Specific Relief Act would be a bar to the suit being brought for a declaration alone, as it clearly could be. Therefore whether the plaintiffs have put in those prayers for additional reliefs or not makes no difference. The suit is essen-

5. (1912) I.L.R. 39 M. 195, 24 M.L.J. 112 (F.B.).

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Reilly, J.

tially, as my learned brother has explained, a suit for a declaration alone. That being so, it must come under Art. 17-A (1) of Schedule II of the Court Fees Act with the result that the valuation for purposes of jurisdiction must be the market value of the property to the extent that the declaration for which the plaintiffs pray, if they obtain it, would affect their interests. The result, therefore, is that, as it has been explained to us, the plaintiffs by getting the declaration that this will is not genuine, will improve their position to the extent of about a quarter of a lakh or at any rate of a sum far in excess of Rs. 3,000. There is no question that the proper Court is the Subordinate Judge's Court and not the District Munsif's Court. I agree, therefore, with the order proposed by my learned brother.

N.S. *Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE PAKENHAM WALSH.

Alagarsami Naidu (dead) and others .. *Appellants* (Defts. and his L.Rs.)*

v.

Ramanathan Chetti, minor by senior paternal uncle and next friend O.Rm. O.M.Sp. Lakshmanan Chettiar .. *Respondent (Plff.).*

Alagarsami Naidu v. Ramanathan Chetti.

Promissory note—Construction—Note executed in the name of the guardian of a minor—Reference to a prior note executed in favour of another guardian of the same minor—Whether guardian or the minor the real payee.

Where the material recitals in a promissory note were as follows: "Promissory note executed on the 14th January, 1920 to Lakshmanan Chetti, son of the senior paternal uncle of and guardian of minor Ramanathan Chetti . . . . deducting Rs. 300 paid in respect of the promissory note executed by me to Subramanian Chetti, guardian of the said Ramanathan Chetti . . . . the amount to be paid by me is Rs 510"

Held, that the reference in the promissory note to the prior promissory note executed by the maker in favour of a previous guardian of the minor showed that the guardian was not intended to be the real payee but the minor was the real payee.

Subbanna v. Subbarayudu, (1925) 50 M.L.J. 125 explained.

Second appeal against the decree of the Court of the 1st Additional Subordinate Judge of Madura, dated 14th April, 1925 in A.S. No. 59 of 1924 (A.S. No. 165 of 1924, District Court, Madura) preferred against the decree of the Court of the

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*S.A. No. 1433 of 1925. 26th October, 1928.

Alagarsami Naidu v. Ramanathan Chetti.

District Munsif of Tirumangalam, dated 13th March, 1924 in O.S. No. 275 of 1923.

T. V. Muthukrishna Aiyar for *N. Kunjithapadam Aiyar* for appellant.

R. Kesava Aiyangar for respondent.

The Court delivered the following

JUDGMENT.—The Lower Court has held that the claim is not barred by limitation. If the payee under the promissory note is the minor plaintiff, no question of limitation arises. The question therefore is, who is the payee under the note in question, Lakshmanan Chetti, the guardian, or Ramanathan Chetti, the minor? . . . . The promissory note so far as it is material to the present purpose runs thus:

"Promissory note executed on the 14th January, 1920, to Lakshmanan Chetti, son of the senior paternal uncle of and guardian of minor Ramanathan Chetti . . . . deducting Rs. 300 paid in respect of the promissory note executed by me to Subramanian Chetti, guardian of the said Ramanathan Chetti . . . . the amount to be paid by me is Rs. 510"

Mr. Muthukrishna Aiyar, the appellant's learned Advocate contends that the real payee under this note is Lakshmanan Chetti. The question is, on a fair construction of this document, in whose favour was it executed? Is Lakshmanan Chetti the payee, the words following his name being merely descriptive of him, or, is the minor the payee, of whom Lakshmanan Chetti is described as the guardian? In *Subbanna* v. *Subbarayudu*,[1] which is the converse of this case, the test to be applied is thus stated:

"The liability must be determined on the wording of the note and in each case the question is: Is the instrument so drawn in form as to make the executant liable or the principal liable? In other words, who is the real executant of the documents? Is the executant in truth the principal although the agent's signature appears on the bill or is the executant the agent although the principal is named?"

In the present case, we are concerned with the payee and not with the executant, as in the case cited. But there can be no doubt that the same principle applies. What then is the proper construction of the words in the promissory note? In the body of the note there is a reference to a prior promissory note executed by the defendant in favour of a previous guardian of the minor. On a reading of the whole document, the reasonable conclusion seems to be that Lakshmanan Chetti was not intended to be the payee but the minor plaintiff. In *Ven-*

1. (1925) 50 M.L.J. 125.

Alagarsami Naidu v. Ramanathan Chetty.

katasubbarayulu v. *Golla Ganguln*, C.R. Ps. Nos. 222 to 224 of 1927, a similar view was taken in regard to a promissory note where the words used in describing the payee closely resemble the words used in this note.

Mr. Muthukrishna Aiyar relies upon certain observations in the case already cited in *Subbanna* v. *Subbarayudu*.[1] The following passage occurs in the judgment in that case:

> "The words in the preamble being doubtful and there being no ambiguity in regard to the signature, the proper view to take is, that any one reading the note will reasonably connect the word 'we' with the names appearing at the bottom of the note."

The difference between that and the present case is obvious. In that case, what was being considered was the liability of the executant, and in the present case we are concerned with the position of the payee. One of the elements taken into consideration in that case was the manner in which the executant signed his name. That element is necessarily wanting in the present case which relates to the case of a payee and not to the case of an executant. But, as we have said, we are applying the same principle as was formulated in that case.

We do not propose to deal with the cases cited to us at the Bar, as they are not of much assistance in construing the promissory note under consideration. We are satisfied that the conclusion of the Lower Court is correct. The second appeal is dismissed with costs.

N.S. *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS AND MR. JUSTICE VENKATASUBBA RAO.

Vatti Kuti Veeranna (minor) by adoptive mother and guardian Achamma .. *Appellant** (*Plff.*)

v.

Katuri Sayamma *alias* Chittamma and others .. *Respondents* (*Defts.* 2 *to* 7).

Vatti Kuti Veeranna v. Katuri Sayamma.

Hindu Law—Adoption—Widow—Adoption under husband's authority by—Relation back of, to date of husband's death—Theory of—Limits to—Joint family—Member predeceased of—Adoption by widow of, pursuant to authority given by him—Alienations by surviving member prior to adoption—Adopted son's right to impeach

A father and his only son constituted a joint Hindu family. The son predeceased his father, having given his wife authority to adopt. After

*S.A. No. 859 of 1925. 10th December, 1928.

1. (1925) 50 M.L.J. 125.

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the son's death, but before his widow adopted the plaintiff pursuant to her husband's authority, the father settled all the joint family property on his daughters. In a suit brought by the plaintiff against his adoptive grandfather for partition of the joint family property, *held*, that the settlement made by the grandfather prior to the plaintiff's adoption was binding on him.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Narasapur in Appeal Suit No. 7 of 1924 (A.S. No. 87 of 1922 on the file of the Temporary Sub-Court, Narasapur) presented against the decree of the Court of the District Munsif of Bhimavaram in Original Suit No. 415 of 1919.

S. Varadachariar for appellant.—Three propositions may be taken as settled: (i) Before his son's death, the grandfather could not have settled the properties. (ii) After the adoption, he could not settle, and (iii) The adopted son's title dates back to the death of the adoptive father. The kind of estate that the grandfather holds in the interval between his son's death and the adoption has to be determined. The length of the interval is not material, except that it may let in other equitable considerations. This is at least analogous to a voidable title and the transferees with notice will be hit.

[*Venkatasubba Rao, J.*—If the alienee takes with notice of the authority to adopt, or of the mere existence of a widow capable of adopting with sapinda's consent, you say the alienation will be bad.]

Nothing strange, as advisers do enquire if there are any pregnant women in the family. An exception may have to be made in favour of a *bona fide* purchaser for value without notice. Another exception will be where the transaction can be supported as a manager's transaction, for even the actual existence of the adopted son will not affect it. Analogous cases covered by texts are (i) of an absent coparcener, (ii) of a posthumous child. The question is whether the adoption brings into existence a joint family or *revives* a joint family. The Hindu theory is that the husband survives in the wife. A Hindu is not deemed to have died sonless so long as his widow or son's widow or grandson's widow is alive and can adopt. (*See* West and Buhler, Hindu Law, 4th Ed., pp. 890, 560, 1013, 1014; Mayne, S. 119, *Mussamut Bhoobun Moyee* v. *Ram Kishore Acharj Chowdhry*[1]). Even under the English Law the theory is that the deceased's personality is projected in the heir (*see* Holmes' Common Law). Take a conveyance of an estate

1. (1865) 10 Moo. I.A. 279 at 312.

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"To *A* absolutely but if a contingency happens to *B* absolutely." A transferee from *A* cannot say that he is not affected by the contingency. He cannot have a better title than his transferor. (See *Lakshminarayna Nainar* v. *Valliammal*,[2] *Krishnaswami Aiyar* v. *Appavier*[3] and *Venkatarama Aiyar* v. *Aiyasami Aiyar*[4]). Another analogous case is a transfer in fraud of maintenance holders, etc., under section 39, Transfer of Property Act. A volunteer will be defeated, *Ranganimal* v. *Echammal*.[5]

Section 198 of Mayne deals with a purchaser and not a volunteer. Mr. Mayne misreads *Raghunada Deo* v. *Patta Deo*.[6] In that case mesne profits were awarded from date of suit on the ground that Raghunada's possession was not wrongful, and not on the ground that he was a *full* owner. Mayne's statement "who at the time was perfectly competent" is begging the question. It was written 50 years ago and much water has flowed under the bridge since.

A. Krishnaswami Aiyar.—What if there is a descent from that intermediate holder.

A question may then arise whether the adoption will be invalid. Granting a valid adoption, the question arises what are the limits of the relation back doctrine. In *Madana Mohana* v. *Purushothama*[7] they say the property is in the survivor as a *conditional estate subject to defeasance* on the coming into existence of the adopted son. At pp. 1113, 1114 "He takes the surviving interest *conditionally*. He gets *no absolute* property in it." On appeal the Privy Council in *Madana Mohana Deo* v. *Purushothama Deo*[8] say Raghunada's right to enter was only *temporary* (p. 858) and 'was of a character only *provisional* and subject to defeasance by the emergence of a male heir to Adikonda' (p. 860). This view is further emphasised in *Sri Jagannadha Gajapathi* v. *Sri Kunja Bihari Deo*.[9] It further shows that the successor cannot be better than the original man for otherwise Purushothama's position must have been held to have been better as heir to Vaishnava.

Take the case of three coparceners *A, B* and *C* owning an impartible estate. *A* the Zamindar for the time being dies leaving a widow with authority to adopt *B* and *C*. Assume

2. (1910) I.L.R. 34 M 250.
3. (1920) 39 M.L.J. 498.
4. (1922) 43 M.L.J. 340.
5. (1898) I.L.R. 22 M. 305: 9 M.L.J. 14.
6. (1876) I.L.R. 1 M. 69: L.R. 3 I.A. 154 (P.C).
7. (1914) I.L.R. 38 M 1105: 27 M.L.J. 306.
8. (1918) L.R. 45 I.A. 156: I.L.R. 41 M. 855: 35 M.L.J. 138 (P.C).
9. (1919) M.W.N. 52.

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adoption by *A's* widow on the one hand and a year after, an adoption by *C*, the estate having vested in *B*. For clearness of illustration alone, the case of impartible estate is taken. Whereas *A's* adopted son will divest *B*, *C's* adopted son gets only maintenance and that is explicable only on the doctrine of relation back.

[*Venkatasubba Rao, J.*—In this Presidency no male survivor can be *full* owner so long as there is a coparcener's widow, since she may adopt at any time with the sapinda's consent.]

It will be as though the last male holder never died. As Holmes puts it, his personality is projected till the date of adoption. The relation back treats the adopted son as born on the date of the adoptive father's death. *Maharaja of Bobbili* v. *Zamindar of Chundi*[10] (Chundi case) says that the alienation will be bad unless it is good as a manager's transaction. The theory is that the interim holder is a representative owner—not a mere termor, nor an absolute owner. The confusion is between "last *male* holder and last *full* holder." In *Sivagnanam Servaigar* v. *Ramaswami Chettiar*[11] it was not necessary to decide this point.' (*See* at p. 94) On the facts the alienation was found to have been made for a binding purpose. This case merely follows Mayne and does not consider how the divesting principle can be explained except by relating back. *Sreeramulu* v. *Kristamma*[12] puts the other side arguments very forcibly. It treats the widow as a representative of the estate and as absolute enjoyer for her life. *Vaidyanatha Sastri* v. *Savithri Ammal*[13] overrules it. Even *Sreeramulu* v. *Kristamma*[12] says the alienation will be bad if it is merely a device to secure the benefit of it to himself. In this case, it is clear that it is merely a device to defeat the adopted son. *Sreeramulu* v. *Kristamma*[12] misreads *Bamundoss Mookerjea* v. *Mussamut Tarinee*[14] (*see* the Privy Council reading of it in *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*[15]). The Full Bench in *Vaidyanatha* v. *Savithri*[13] says, "if he can divest the widow, he can equally divest the alienee" (p. 95). I also rely on p. 96: "Though the . . . shared with" and the last sentence in that para. and "when however . . . . as if he was a posthu-

10. (1910) I.L.R. 35 M. 108: 21 M.L.J. 593.
11 (1911) 22 M.L.J. 85.
12. (1902) I.L.R. 26 M. 143: 12 M.L.J. 197.
13. (1917) I.L.R. 41 M. 75: 33 M.L.J. 387 (F.B.).
14. (1858) 7 Moo. I.A. 169 at 199.
15 (1918) L.R. 46 I.A. 97: I.L.R. 43 B. 778: 36 M.L.J. 511 (P.C.).

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mous son." The basis of the Full Bench cannot be that the widow's estate ceases, as it will equally cease on surrender.

Pratapsingh Shivsingh v. *Agarsingji Rajasingji*[15] says there is *no hiatus* at all, that it is a *vesting in suspense*—a *provisional vesting* and at page 794 they recognise that lapse of time may bring in other considerations.

[*Venkatasubba Rao, J.*—The surviving member cannot even partition as there is nobody for him to partition with.]

That raises another question as to what is the share that is provisionally vested in him. *Maharaja of Bobbili* v. *Raja Kaminayini Bangaru*[16] says he is like a widow.

Two other considerations support the theory that the husband's legal personality is continued during the lifetime of the widow, (i) that his heir is to be determined at her, *i.e.*, widow's death, (ii) the adoption to a man can only be made by his widow and by none else. *Mata Prasad* v. *Nageshar Sahai.*[17] The relevancy of the last para. appears from the report in *Nageshar Sahai* v. *Mata Prasad and others.*[18] The Privy Council say it is a continuation of the husband. It may be said that the grandfather is a provisional owner to the extent of the share of the deceased son, but this will be assuming that there is such a thing as a notional share on that date. If the theory be that the adoptive father is living the surviving member cannot deal with it except to the extent to which a coparcener can deal with his share. The following cases were also referred to: *N. Ahmed-un-Nissa Begam Sahiba* v. *A. T. Arundel,*[19] *Venkatarama Aiyar* v. *Gopalan,*[20] *Adivi Suryaprakasa Rao* v. *Nidamarty Gangaraju,*[21] *Ramakrishna* v. *Shamarao,*[22] *Bachoo* v. *Mankorebai,*[23] *Rai Jatindra Nath Chaudhuri* v. *Amirta Lal Bagchi*[24] and *Monirani Kolita* v. *Keri Kolitani.*[25]

Krishnamurthi Aiyar v. *Krishnamurthi Aiyar*[26] only says "the will speaks as at the death of the testator and the property is carried away *before* the adoption takes place." *See* also *per*

15 (1918) L.R. 46 I.A. 97: I.L.R. 43 B 778. 36 M.L.J. 511 (P.C.).
16. (1910) 21 M.L.J. 593.
17. (1925) L.R. 52 I.A. 398: I.L.R. 47 A. 883 at 899: 50 M.L.J. 18 (P.C.).
18. (1922) 25 O.C. 189 at 200.
19. (1883) I.L.R. 7 M. 64.
20. (1918) 35 M.L.J. 698
21. (1909) I.L.R. 33 M. 228.
22. (1902) I.L.R. 26 B. 526.
23. (1904) I.L.R. 29 B. 51 on appeal I.L.R. 31 B 373.
24. (1900) 5 C.W.N. 20.
25. (1880) I.L.R. 5 C. 776: L.R. 7 I.A. 115 (P.C.).
26. (1927) I.L.R. 50 M. 508 at 525: 53 M.L.J. 57 (P.C.).

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Subramania Aiyar, J., in *Krishnan Nambiar* v. *Kannan*.[27] That does not negative my contention.

A. Krishnaswami Aiyar for respondents.—The contention on the other side is that whenever a Hindu dies leaving a widow, the successive devolutions of his interest in the property to persons other than the widow must be deemed to be *provisional,* for the only real succession is lineal succession which is not exhausted until the widow dies.

[*Venkatasubba Rao, J.*—Not when it goes by inheritance.]

[*Odgers, J.*—You mean the fear of adoption may last for a century.]

The coparcenary suggested is an anomalous coparcenary without a coparcener to partition with. Following up the argument, it is not clear if that imaginary coparcenary is with the deceased himself or with the son to come. In the decided cases, the coparcener can alienate his share for value and become divided by a mere declaration of intention but by this fictitious son he cannot do either. If the survivor has sons and alienates his share, what is the share which the alienee takes. The Full Bench in *Chinnu Pillai* v. *Kalimuthu Chetti*[28] says, it is to be computed as at the time of the alienation. (The fictional son can be taken into consideration). *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar*[26] decline to apply the doctrine of relation back to the case of a will made by the sole owner who dies leaving a widow with power to adopt. This relation back is only an exception to the general rule that inheritance cannot be in abeyance and the intermediate owner is a provisional owner only to the extent to which he is affected on the coming into existence of the adopted son. When the adoption takes place, the property is taken only as at the date of adoption, *e.g.,* (i) a male owner himself making an adoption, (ii) a will disposing of property and giving also authority to adopt. A widow succeeding to the property is not bound to account to the adopted son for her dealings in the interval. She is not treated as a guardian of the future adopted son. See *Lakshmana Rau* v. *Lakshmi Ammal*.[29] *Sivagnanam Servaigar* v. *Ramaswami Chettiar*[11] is an express decision on the present question as they put this as an independent ground of decision and not *obiter*. The reasoning is not based on its being a purchase, but proceeds on the footing that the

11. (1911) 22 M.L.J. 85.
26. (1927) I.L.R. 50 M. 508: 53 M.L.J 57 (P.C.).
27. (1897) I.L.R. 21 M. 10.
28. (1911) I.L.R. 35 M. 47: 21 M.L.J. 246 (F.B).
29. (1881) I.L.R. 4 M. 160 at 164.

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intermediate holder being a male owner he must be entitled to do what he likes with the property. Motives of parties ought not to be looked at in determining their legal rights. The antithesis is between a "female owner" and "male owner" and not between last "male owner" and "last full owner."

[*Venkatasubba Rao, J.*—The question now is whether after *Madana Mohana Deo* v. *Purushothama Deo*,[8] and *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*[15], *Sivagnanam Servaigar* v. *Ramaswami Chettiar*[11] is good law.]

[*Odgers, J.*—What do you mean by saying what is good for the rule of non-liability to account is good also for alienation.]

The Judges in *Sivagnanam Servaigar* v. *Ramaswami Chettiar*[11] anticipate and accept the relation back doctrine and still say the alienation is good.

[*Venkatasubba Rao, J.*—But the Chief Justice does not accept the view in *Madana Mohana Deo* v. *Purushothama Deo*.[8]]

Phillips, J., at p. 103 says, "even if I am wrong . . . . full male owner of the estate." The argument on the other side puts the adopted son on a better footing than the natural born son. It is not the ethereal existence of the deceased that is said to be a bar to the alienation but the coming in of a son. The restriction on alienation arises from the existence of a concurrent interest in others. The disappearance by death, etc., of that concurrent interest removes the restriction and it is only when another coparcener comes in, that the restriction again comes in but that will be only with regard to the *then existing* property. *Maharaja of Bobbili* v. *Zamindar of Chundi*[10] was a case of an impartible estate.

[*Venkatasubba Rao, J.*—*Sivagnanam Servaigar* v. *Ramaswami Chettiar*[11] is also like that.]

It was in answer to the extreme contention that there is no power of alienation at all, that they say he is at least a limited owner. They do not say he is only a limited owner.

[*Venkatasubba Rao, J.*—Sivaswami Aiyar argued contrary position in *Maharaja of Bobbili* v. *Zamindar of Chundi*[10] and positions in *Maharaja of Bobbili* v. *Zamindar of Chundi*[10] and both.]

8. (1918) L.R. 45 I.A. 156: I.L.R. 41 M. 855: 35 M.L.J. 138 (P.C).
10. (1910) I.L.R. 35 M. 108: 21 M.L.J. 593.
11. (1911) 22 M.L.J. 85.
15. (1918) L.R. 46 I.A. 97: I.L.R. 43 B. 778: 36 M.L.J. 511 (P.C).

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Mayne who calls him a "full owner" is cited in support of it. Relation back was first mooted in *Bamundoss Mookerjea* v. *Mussamut Tarinee*[14] and the Privy Council there repel the argument that the widow is a guardian for the prospective adopted son (reads pp. 182, 185, 188, 189 and 206). Fictions ought not to be carried to their logical consequences. "An additional difficulty . . ." at p. 312 bottom in *Mussamut Bhoobun Moyee Debia* v. *Ram Kishore*[1] is only one of several reasons given by them. Mayne reads *Sri Raghunada Deo* v. *Patta Deo*[6] correctly. In *Bhubaneswari Debi* v. *Nilcomul Lahiri*[30] it was held that the adopted son cannot divest the collaterals though the adoption there was delayed by the fraud of the very person that succeeded to the inheritance. In *Bachoo* v. *Mankorebai*[23] the widow was actually *enciente*. The case only says that if a coparcener's widow adopts, the other coparceners cannot question it on the ground that their interests will be diminished, it being a normal incident of coparcenary to have new parceners coming into the family either by birth or by adoption (p. 379). *Madana Mohana Deo* v. *Purushothama Deo*[8] is practically Chandrabuli's case and a succession case. This doctrine of provisional owner cannot have any appositeness in joint families to a person who is already an owner. At p. 859 they distinguish *Raghunada Deo* v. *Patta Deo*[6] and say the adopted son cannot go and divest heirs from Brozo Kishore. *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*[15] merely says that affiliation by adoption can be made after death and as issue includes adopted sons also, the adopted son could claim the jivai grant. That is all the decision (p. 792). They do not disapprove of *Bamundoss Mookerjea* v. *Mussamut Tarinee.*[14]

[*Venkatasubba Rao, J.*—What is the implication in "it may be."]

They say he is the continuator of his adoptive father's line exactly as an *aurasa* son. *Moro Narain* v. *Balaji*[31] and *Harek Chand Babu* v. *Bejoy Chand Mahatab.*[32] Clearly limitation does not begin to run against him before his adoption

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1. (1865) 10 Moo. I.A. 312.
6. (1876) I.L.R. 1 M. 69: L.R. 3 I.A. 154 (P.C.).
8. (1918) L.R. 45 I.A. 156: I.L.R. 41 M. 855: 35 M.L.J. 138 (P.C.).
14. (1858) 7 Moo I.A 169.
15. (1918) L.R. 46 I.A. 97: I.L.R. 43 B. 778: 36 M.L.J. 511 (P.C.).
23. (1904) I.L.R. 29 B. 51 on appeal I.L.R. 31 B 373.
30. (1885) L.R. 12 I.A. 137: I.L.R. 12 C. 18 (P.C.).
31. (1894) I.L.R. 19 B. 809.
32 (1905) 9 C.W.N. 795.

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(see the observations in *Harek Chand Babu* v. *Bejoy Chand Mahatab*[32]). *Jagannadha Rao* v *Ramayamma*[33] holds that under a will authorising the widow to adopt, a guardian can be appointed for the prospective son and in *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar*[26] they hold that the adopted son cannot question dispositions made under the will. These show that relation back doctrine cannot be extended so as to affect prior alienations. *Rambhat* v. *Lakshman Chintaman*[34] says an adopted son cannot question the father's alienation made prior to adoption. *Vaidyanatha* v. *Savithri*[13] does not go back on the observations of Sir Charles Turner in *Lakshmana Rau* v. *Lakshmi Ammal*[29] "Alienations for necessary purposes cannot be questioned" p. 83; "The rights sprung into existence the moment of his adoption, though his rights arise only from the date of adoption," pp. 91 and 93. At p. 96, "Fiction of constructive pregnancy through permission to adopt has been exploded by a series of decisions." All passages in West and Buhler are referred to and discussed in judicial decisions. The analogy of defeasible estate is misleading, for then, even alienations for necessity cannot stand. There is nothing so dangerous in law as a metaphor. *Knox* v. *Gye.*[35]

The question of fraud may arise only in the case of donees of power, not in the cases of absolute owners. See *Mayor, etc., of Bradford* v. *Pickles,*[36] *Allen* v. *Flood,*[37] *Lakshmana Rau* v. *Lakshmi Ammal,*[29] *Chunder Das* v. *Monohari Dassi,*[38] and on appeal *Bhubaneswari Debi* v. *Nilcomul Lahiri.*[30] *Sreeramulu* v. *Kristamma*[12] only said that if it were a contrivance by which it is to be held for her, then it is as though there is no alienation. As regards the analogy of alienations in fraud of creditors and maintenance holders, the distinction is that in those cases there is an existing right which is defeated.

S. Varadachariar in reply.—No other explanation than the one submitted by me has been suggested for the divesting rule. Read West and Buhler and compare

12 (1902) I.L.R. 26 M. 143 at 156· 12 M.L.J 197.
13. (1917) I.L.R. 41 M. 75: 33 M.L.J. 387 (F.B).
26. (1927) I.L.R. 50 M. 508: 53 M.L.J. 57 (P C.).
29. (1881) I.L.R. 4 M 160.
30. (1885) L.R. 12 I.A. 137: I.L.R. 12 C. 18 (P C.).
32. (1905) 9 C.W.N. 795
33. (1920) I.L.R. 44 M. 189: 40 M.L.J. 46.
34. (1881) I.L.R. 5 B. 630, at 636.
35. (1872) L.R 5 H.L. 656 at 676.
36. (1895) A.C. 587. 37. (1898) A.C. 1.
38. (1881) I.L.R. 7 C. 269 at 281.

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it with *Madana Mohana Deo* v. *Purushothama Deo*.[8] The same words are used in *Krishna* v. *Sami*[39] where dealing with an absent son, they say it is *conditional vesting.* In *Chengama Naidu* v. *Krishnasami Naidu*[40] at the instance of an after-born son a partition at which the father retained no share for himself was re-opened. See *Babu Anaji* v. *Ratnoji Krishnarav.*[41] Their Lordships say: "The father's line is continued in the person of the boy adopted . . . just as though the latter had left a natural son born in his lifetime or a posthumous son" and later on "For the purposes of inheritance the adoption may be considered as relating back to the death of the adoptive father divesting all estates which have during the intermediate period become vested at it were conditionally in another." *Venkappa Bapu* v. *Jivaji Krishna*[42] and *Moti Raiji* v. *Laldoss Jebhai*[43] really give the reason underlying the divesting principle. *Bhubaneswari Debi* v. *Nilcomul Lahiri*[30] is not a case of inheritance to the adoptive father's property. *Sreeramulu* v. *Kristamma*[13] takes one view on grounds of convenience. *Ramakrishna* v. *Tripurabai*[44] and *Vaidyanatha* v. *Savithri*[12] take another view. That is largely a matter of personal equation. Arguments were advanced with reference to the inconveniences in the matter of partition, alienation, etc. What is the answer to similar arguments in the case of an absent coparcener or impartible estates; or where a coparcener is on his death-bed and there is a widow *enceinte*. Again, take a case where the nearest sapinda is a minor and the widow wants to adopt. Whom is she to consult? Arguments of convenience are always like the chancellor's foot and very uncertain. *Moro Narain Joshi* v. *Balaji Raghunath,*[31] *Harek Chand Babu* v. *Bejoy Chand Mahatab*[32] deal with cases of limitation. Take the facts in *Raghunada Deo* v. *Patta Deo.*[6] Suppose a stranger is prescribing against Raghunada. According to the other side's reading of those cases, the subsequent adopted son will not be barred. In *Harek Chand Babu* v. *Bejoy Chand Mahatab*[32] the reasoning of the two Judges (Mukerjee and Harington) is

6. (1876) I.L.R. 1 M 69 L.R. 3 I.A. 154 (P.C).
8. (1918) L.R. 45 I.A. 156: I.L.R. 41 M. 855: 35 M.L.J. 138 (P.C).
12. (1902) I.L.R. 26 M. 143 at 156 12 M.L.J. 197
13. (1917) I.L.R. 41 M. 75: 33 M.L.J. 387 (F B.).
30. (1885) L.R. 12 I.A. 137: I.L.R. 12 C 18 (P.C).
31. (1894) I.L.R. 19 B 809.
32 (1905) 9 C.W.N. 795.
39. (1885) I.L.R. 9 M. 64 at 79 (F.B).
40. (1896) I.L.R. 20 M. 75.
41. (1895) I.L.R. 21 B. 319 at 324.
42. (1900) I.L.R. 25 B. 306.
43. (1916) I.L.R. 41 B. 93.
44. (1908) I.L.R. 33 B. 88.

different. *Jagannadha Rao* v. *Ramayamma*[33] and *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar*[26] do not conflict with the relation back doctrine. Subramania Aiyar in *Ganapathi Aiyan* v. *Savithri Ammal*[45] says the disposition by will can be justified even assuming that theory because the adoption is not *by* the father but *to* the father. *Vitla Butten* v. *Yamenamma*[46] also shows the distinction. The case in *Mayor, etc., of Bradford* v. *Pickles*[36] and other cases of that kind deal with an absolute owner. It is only on the footing that the interim holder has only a qualified estate that the question of fraud will be material.

S. Varadachariar and *A. Satyanarayana* for appellant.

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for respondents.

The Court delivered the following

Odgers, J.

JUDGMENTS. *Odgers, J.*—This Second Appeal has opened a very wide field in the Hindu Law of adoption and we have had a very learned and instructive argument on both sides and I should like to say personally that I feel very much indebted to the learned Advocates who appeared. The question opened up by the arguments have been very far-reaching and several topics perhaps not strictly germane to the actual point for decision have been touched upon, but this is only an illustration of the way in which the different elements in the Hindu Law of adoption interact upon each other and it is almost impossible in discussing the case-law, on which after all the law of adoption is developed at least as far as this Presidency is concerned and on which it now depends, not to discover a great variety of elements which largely overlap. Thus we shall find in the cases to be examined that most of them deal with more than one of these elements and the question which presents the greatest difficulty is as to how far the decisions and particularly the dicta on which the decisions seem to be based are reconcilable and whether it is possible to obtain from the present state of those decisions any really definite line to guide us to a decision on this and similar cases.

The facts of this case can be stated in a very few words. The 1st defendant had a son called Abbulu and they formed a joint Hindu family. This son Abbulu on the 30th August, 1918, gave his wife an authority to adopt. A month afterwards,

26. (1927) I.L.R. 50 M 508: 53 M.L.J. 57 (P.C.)
33. (1920) I.L.R. 44 M. 189: 40 M.L.J. 46.
36. (1895) A.C. 587.
45. (1897) I.L.R. 21 M. 10 at 16.
46. (1874) 8 M.H.C.R. 6.

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namely, on the 29th September, 1918, the son Abbulu died and four days after that on the 3rd October, 1918, the father settled practically the whole of the family property on his daughters. On the 22nd Nov. 1918, the plaintiff was adopted by Abbulu's widow and in 1919 this suit was brought on behalf of the minor adopted son claiming a half share on partition with his adoptive grandfather who died while the suit was pending in the First Court. Hence the plaintiff now claims to be entitled to the whole of the family property. The question thus arises whether the plaintiff receives practically nothing, *i.e.*, takes the family property subject to the settlement of the 3rd October, 1918 or whether his adoption can relate back to the date of his adoptive father's death, namely, the 29th September, 1918 in order to defeat the grandfather's settlement. The Munsif decided that the plaintiff was entitled to the properties. The Subordinate Judge decided on the other hand that the plaintiff must take subject to the disposition by the grandfather, *i.e.*, as I understand it, practically nothing.

This appeal therefore opens up questions of the highest importance which owing, as I think, to the interaction of the elements in the Hindu Law of adoption do not perhaps appear very clearly from the decided cases, so that we shall have to consider (*a*) the nature of the estate taken by the surviving member of a coparcenary when the only other member has died leaving a widow with power to adopt, and (*b*) the position of a donee of the surviving member in competition with a subsequently adopted son; in other words, does the settlement by the grandfather of the 3rd October, 1918 divert the course of devolution of the property under the Hindu Law? And this of course opens the first of these questions, namely, the estate of the surviving member.

Perhaps it is as well to begin an examination of the authorities with a text and the text that I would begin with can be found in Mayne, para. 198 (9th Edition). This paragraph of Mayne comes after a discussion, of which there are many examples in the cases, on the power of an adopted son to challenge alienations made prior to his adoption by the widow who adopts him. Mr. Mayne says:

"I am not aware of any case which has raised the same question, where the person whose estate was divested by adoption was a male, and therefore a full owner. But I conceive the same principles would apply. Until adoption has taken place he is lawfully in possession, holding an estate which gives him the ordinary powers of alienation of a Hindu proprietor. No doubt he is liable to be superseded; but on the

other hand, he never may be superseded. It would be intolerable that he should be prevented from dealing with his own, on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one who, at the time, was perfectly competent to grant them."

Of course if that text can be taken to be literally true and correct, there is an end of the matter and till the adoption has taken place, the grandfather was in the position of full owner and could do what he liked with the property and therefore pass by his settlement a perfectly valid and indisputable title to his donees. But Mr. S. Varadachariar challenges the accuracy of this absolute statement and undertakes to show from the authorities that it needs very considerable modification. In fact his contention may be fairly indicated by saying that no Hindu is an absolute owner so long as there is a power of adoption outstanding which, if and when exercised, will diminish his interest in the family property by one-half. This has been called by Mr. Justice Seshagiri Aiyar in *Madana Mohana* v. *Purushothama,*[7] "an estate subject to defeasance." With great respect, I rather doubt if that is the correct expression to apply to an estate of this kind which is of course familiar to every Hindu—I mean the possibility of the interest of one—coparcener in joint family property being increased or decreased on partition according as more coparceners come into being or coparceners go out of being. That is inherent in the conception of a Hindu joint family. What I take the learned Judge meant is, that, where you have a single coparcener, though he still remains owner of the whole on the birth or coming into existence of a second coparcener, still on a division he has lost the absolute estate which he had as sole surviving member of the coparcenary but will now only be able to take as his separate property one-half of the whole or less according to the number of new members, so that the theory with regard to the surviving member of a coparcenary in the position of the grandfather in this case is that so long as the power to adopt is outstanding he has really only got an absolute estate in a half because, if and when an adoption to his deceased son takes place, that adopted son becomes immediately a coparcener with himself, entitled to half of the property on a partition. So that what we have to see is whether this theory is supported by the decision, and even supposing it is so supported, is it to apply to alienations made by the adoptive grandfather before the adoption took place? It is

7. (1914) I.L.R. 38 M. 1105 : 27 M.L.J. 306.

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settled that an after-born *aurasa* son cannot question the alienation made, *e.g.*, by the manager of his coparcenary, his father, prior to his birth and it seems startling if it is true that an adopted son should be in any better position. Many inconveniences suggest themselves to the mind if this theory is true as, for instance, the effect it would have on succession, for it would make all succession provisional. It would add a further element of infirmity to titles to immoveable property in this country because it would be necessary to enquire on every transaction involving immoveable property whether there was an outstanding authority to adopt because, if there were, on this theory the transferor would not have absolute power to alienate more than one-half. However, inconvenience is of course by way of being an argument in the last resort. Although enough has been said to show that, if the argument is adopted, an extremely serious state of things may ensue, yet if the law is as stated in the proposition, then of course the fact that it entails inconveniences or infirmities of title is no excuse for evading its recognition.

This theory advanced by Mr. Varadachariar is according to his contention illustrated in a number of cases and, as I have already stated, the cases are what we have to look to in a matter of this sort, because as is well known, the ancient texts are singularly bare of authority with regard to adoption and the law on this subject has been practically entirely Judge-made. The cases, I have analysed under three heads. Although as will presently appear the decision in any particular case may overlap more than one head, that is an illustration of what I was saying just now as to the interaction of the various elements in this branch of the Hindu Law. The heads that I propose to examine the cases under I have called

(*a*) as affecting inheritance,

(*b*) with regard to the doctrine of relation back, and

(*c*) as affecting alienations.

I have dealt with the cases under each head repeating if necessary reference to the same case when it falls under more than one head.

(*a*) The earliest case to which our attention has been called is the well-known case in *Bamundoss Mookerjea* v. *Mussamut Tarinee*.[14] That was a case in which the Sudder Dewanny delivered a very full judgment covering a number of points in

14. (1858) 7 Moo. I.A. 169.

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the law of adoption and which the Privy Council adopted in its entirety both upon the question of law and the question of fact save for one incidental observation which is not material. That decision *inter alia* laid down that until a widow exercised the power of adoption vested in her, she is possessed of the property from the death of her husband and can therefore sue in her character as widow in order to claim succession to the estate of her husband in spite of the fact that she possesses an unexecuted power of adoption. In *Mussamut Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[1] we have an example of the limit on the power to adopt. Several cases were quoted with regard to the limit of the power, (*i.e.*), as to when it comes to an end because as their Lordships laid down in the case last cited, there must be some limit, but that seems to me to be a definite topic that we can dispense with in considering the case before us. Then we have the cases from the Chinnakimidy Zamindari beginning with *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*,[6] where it was contended that the widow could not displace by adoption an heir in whom the estate had once vested. It was a case of an impartible estate where the widow of the senior coparcener and late Zamindar adopted two years after his death and divested the late Zamindar's next younger brother who had succeeded to the Zamindari on his death in 1868. The Privy Council held that on the widow exercising the power conferred on her by the late Zamindar to adopt, the adopted son divested his uncle, though in the case of the youngest brother of the late Zamindar who also had an adopted son, it was held that there was no relation back in the case of an adoption by a male. Now this case is cited to show that the estate of the next younger brother was only conditional till a possible adoption took place. At the same time their Lordships point out at page 83 that "at that time Raghunada (that is to say, the next younger brother) was in default of a son of Adikonda (the deceased Zamindar) natural or adopted, unquestionably entitled to the Zamindari." The case is also of importance from the fact that their Lordships of the Privy Council decreed mesne profits against Raghunada only from the date of suit, which shows of course that he was not a trespasser as he was entitled in default of a nearer heir of Adikonda. It is important to note this feature in the case as it is relied on in a subsequent case for another proposi-

1. (1865) 10 Moo. I.A. 279 at 309.
6. (1876) I.L.R. 1 M. 69: L.R. 3 I.A. 154 (P.C.).

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tion under one of the several heads. *Madana Mohana* v. *Purushothama*[7] referred to *supra* and *Madana Mohana Deo* v. *Purushothama Deo*[8] are further cases as to the succession to this same Chinnakimidy estate. These cases involved the power of the widow of Adikonda to adopt when there was the son's widow alive who might have adopted to that son. The plaintiff who had been adopted in 1907 by the widow of Adikonda claimed the property as against the son's sons of Raghunada, the younger brother of Adikonda. Mr. Justice Seshagiri Aiyar pointed out that a Hindu estate can never be in abeyance but must vest in somebody or other. The "intermediate holder" as he was called is not to be regarded as the absolute owner of the property. This case went up to the Privy Council in *Madana Mohana Deo* v. *Purushothama Deo*,[8] where their Lordships held that the succession of Raghunada was only provisional and that the widow of Adikonda can have had no further right to adopt after the death of her original adopted son who had attained full legal capacity to continue the line. The third of the Chinnakimidy cases is *Bheema Deo* v. *Behari Deo*[47] where it was held that the estates of Viswanatha and Purushottam, that is, the son and grandson of Raghunada, were defeasible estates. The question involved in this case was the validity of the adoption made by Ratnamala, the widow of the first son adopted to Adikonda. To continue the cases in the order of date *Krishna* v. *Sami*[39] shows that the existence of the power creates the potentiality of inheritance As pointed out in *Babu Anaji* v. *Ratnoji Krishnarav*[41] the effect of adoption must always be to divest to some extent an estate vested elsewhere. *Venkappa Bapu* v. *Jivaji Krishna*[42] was a case of limitation on a widow's power to adopt which the learned Judges said depended upon the question as to whether by such adoption she derogates from any other rights but her own and in *Bachoo* v. *Mankorebai*[23] which went to the Privy Council in *Bachoo* v. *Mankorebai*,[23] it was decided that the estate had not absolutely vested in one Bachoo, the plaintiff in the suit, owing to the existence of a power in the widow of Bhagwandas to adopt. Their Lordships applied the decision in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo*

7. (1914) I.L.R. 38 M. 1105: 27 M.L.J. 306.
8. (1918) L.R. 45 I.A. 156: I.L.R. 41 M 855: 35 M.L.J. 138 (P.C.).
23. (1904) I.L.R. 29 B. 51 on appeal I L.R. 31 B. 373 (P.C).
39. (1885) I.L.R. 9 M 64 (F B).
41. (1895) I L.R. 21 B. 319.
42. (1900) I.L.R. 25 B. 306.
47. (1921) L.R. 48 I.A. 482: I.L.R. 44 M 733: 41 M.L.J. 648 (P C).

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Kishoro Patta Deo[6] that the estate did not absolutely vest and this may be an example of the diminution of the interest of a sole coparcener by the emergence of another which was referred to in the opening of this judgment. *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*[15] in the Privy Council was a question of succession to a Jivai grant. There it was held that there was no *hiatus* in the succession and no extinction of the line until the death of the widow without having adopted. Now, it will be apparent from a consideration of these cases and the decisions which have been extracted above that all these cases have in view mainly the question of inheritance and as Mr. Varadachariar suggested and as we shall see when we come to consider the class (*b*) cases as to relation back that two theories are possible, namely, that the existence of the deceased husband is fictionally prolonged in his widow or that the adoption of the son is fictionally related back to the death of his adoptive father. As to which if either is the correct theory I am rather doubtful whether it can be established from the decisions. The former theory is favoured by Messrs. West and Buhler who on page 983 of their work state:

"It is true that in many instances the supposed prohibition (*i.e.*, against adoption) coincides in its operation with the actual principles of the Hindu Law as drawn from the Hindu sources, but in others it does not. It is desirable, therefore, that these principles and their bearing on the matter in question should, if possible, be ascertained and established. The *sacra* of a Hindu family are regarded as descending regularly with its estate from father to son for ever."

The widow's life is, in the view of the learned authors, a prolongation of her husband's and her adoption to her deceased husband simply a deferred act of the husband himself.

(*b*) I want now to take the second class of cases and see if the decisions in which this theory of relation back has been applied has, as Mr. Alladi Krishnaswami Aiyar contends, nothing to do with any question of validating or invalidating alienations but only to do with the question of divesting intermediate holders by the fiction that the adoption took place either at the same moment or prior to the possession obtained by the person or persons so divested. I gather there are only some eight decisions on this point of relation back. The earliest and the one very often relied on is *Bamundoss Mookerjea* v. *Mussammut Tarinee*,[14] though how far this reliance is now well

6. (1876) I.L.R. 1 M 69: L.R. 3 I.A. 154 (P.C.).
14 (1858) 7 Moo. I.A. 169 at 183.
15. (1918) L.R. 46 I.A. 97: I.L.R. 43 B. 778: 36 M.L.J. 511 (P.C.).

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founded may perhaps be questioned owing to the view of the Privy Council in *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*,[15] where they held that this case only decided as to a widow's right to maintain an action in her own name when she possesses a power to adopt. There the Sudder Dewanny said:

> "The after-born son's right is to his share of the estate as it stands at the time of his birth, and not retrospectively with reference to its state at any supposed period of his conception."

So in *Lakshmana Rau* v. *Lakshmi Ammal*[29] where *Bamundoss Mookerjea* v. *Mussamut Tarinee*[14] is relied on, it was held that the title of an adopted son does not relate back to the death of the widow's deceased husband. Further in *Moro Narayan Joshi* v. *Balaji Raghunath*,[31] which was a question of limitation, adverse possession was said not to begin to run till adoption and the adoption did not relate back to the adoptive father's death again relying on *Bamundoss Mookerjea* v. *Mussamut Tarinee*.[14] In *Babu Anaji* v. *Ratnoji Krishnarav*[41] it was held that for purposes of inheritance the adoption must be considered as relating back to the death of the adoptive father—compare *Mata Prasad* v. *Nageshar Sahai*,[17] where the adoption of a boy was related back to the death of the father to whom he was adopted. In *Harek Chand Babu* v. *Bijoy Chand Mahatab*,[32] another question of limitation, Harington, J., held that for certain purposes an adopted son is regarded as being in existence at the adoptive father's death. On the other hand, Mookerjee, J., held that the rights of an adopted son did not relate back to a period earlier than the date of adoption. Of authority in this Court as to relation back, there is but little. In *Madana Mohana Deo* v. *Purushothama Deo*,[8] to which reference has already been made, it was observed that Adikonda's widow at one time by exercising her power could establish the direct succession to the estate of her husband which related back to his death. In *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*,[15] to which also reference has already been made, it will be remembered that the Privy Council held that there was no *hiatus* in the continuity of the line and that so far as this is concerned the adoption had a retrospective effect.

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8 (1918) L.R. 45 I.A. 156: I.L.R. 41 M 855: 35 M.L.J. 138 (P.C.).
14. (1858) 7 Moo. I.A. 169.
15. (1918) L.R. 46 I.A. 97: I.L.R. 43 B. 778: 36 M.L.J. 511 (P.C.).
17. (1925) L.R. 52 I.A. 398: I.L.R. 47 A 883: 50 M.L.J. 18 (P.C.).
29. (1881) I.L.R. 4 M. 160
32 (1905) 9 C.W.N. 795.
31. (1894) I.L.R. 19 B. 809.
41. (1895) I.L.R. 21 B. 319.

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(*c*) Now it seems to me from my examination of the cases that the only case in which it can be said that the adopted son can on the theory of relation back object to alienations made before his adoption is confined to the case of alienations by a widow. It is well known that a reversioner may object successfully to a widow's alienations except for family necessity while the estate of her husband is in her hands, she possessing a Hindu widow's estate in the same. It is of course also well known that since *Vaidyanatha Sastri* v. *Savithri Ammal*[13] an adopted son can set aside alienations by the widow not made for necessity during her life-time, his cause of action having arisen from the date of adoption. He is thus in a better position than the ordinary reversioner with regard to a widow's alienations and it is perhaps significant that in Sarkar's learned exposition on the law of adoption, to which we have been referred, in his paragraph on page 416 on the relation back of adoption and alienations made by a widow before adoption, his discussion is entirely confined to the rights and acts of the widow. As Sir Arnold White, C.J., said in *Sivagnanam Servaigar* v. *Ramaswami Chettiar*[11] the question of the effect of an alienation by a man holding a full estate with reference to a subsequent divesting as the result of a subsequent adoption does not seem to have been considered in any reported case. That case is of importance because it is a clear authority for the decision that when an estate is divested by subsequent adoption, the adopted son's rights date only from his adoption and therefore he takes the estate subject to alienations by the holder for the time being. *Bamundoss Mookerjea* v. *Mussamut Tarinee*[14] is relied on as also *Harek Chand Babu* v. *Bijoy Chand Mahatab*.[32] Sir Arnold White also relies in his judgment on *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*[6] where it will be remembered the Privy Council decreed mesne profits against the intermediate holder only since the date of the suit to show that the male owner can deal as he likes with his own. In *Rambhat* v. *Lakshman Chintaman Mayalay*[34] it was held that alienation by a Hindu without issue binds the subsequent born or adopted male issue and such issue take a vested interest in such property only

6. (1876) I.L.R. 1 M. 69: L.R. 3 I.A. 154 (P.C).
11. (1911) 22 M.L.J. 85.
13. (1917) I.L.R. 41 M 75: 33 M.L.J. 387 (F.B.).
14. (1858) 7 Moo. I.A. 169.
32. (1905) 9 C.W.N. 795.
34. (1881) I.L.R. 5 B. 630.

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as is that of the father at that time. In *Moro Narayan Joshi* v. *Balaji Raghunath*[31] it was held that the adopted son comes in bound by such acts of the widow as would bind the natural heirs of the husband after her and entitled to set aside unauthorised alienations of the widow. The well-known case in *Sreeramulu* v. *Kristamma*,[12] which was subsequently overruled in this Court, contains Justice Sir V. Bhashyam Aiyangar's view that all alienations of any kind by a Hindu widow are valid at least for her widowhood. She takes an estate of inheritance only restricted as to her power of disposition and she is not guardian of the property, so that even an unauthorised alienation, *i.e.*, one not for family necessity, cannot be questioned until after her death. In *Ramakrishna* v. *Tripurabai*,[44] *Sreeramulu* v. *Kristamma*[12] was disapproved and the Court held that alienations not for necessity by a widow cease to have any effect after an adoption made by her as she has by then ceased to represent the estate. There is an *obiter dictum* in *Maharaja of Bobbili* v. *Zamindar of Chundi*[10] to the effect that the 1st defendant's estate in that case was only that of a limited owner like a widow and not being absolute it could not validate loans and alienations but that cannot be regarded as a serious decision on the point as it is distinctly *obiter* and really turned on the question as to whether sufficient enquiry had been made by an intending lender. In *Jagannadha Rao* v. *Ramayamma*,[33] a decision to which I was a party, a sole coparcener made a will having an absolute power of disposition. He appointed a guardian to manage the property and the son to be adopted after his death. We held that he had the power to do so. Finally, in *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar*[26] their Lordships of the Privy Council say as follows:

"When a disposition is made *intra vivos* by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place"

It is suggested that that decision of their Lordships cannot stand in view of what is said in their earlier decisions but it seems to me that if we construe the earlier decisions I have

10 (1910) I.L R 35 M 108 21 M.L J. 593
12 (1902) I L.R. 26 M 143
26. (1927) I.L.R. 50 M 508 at 525 53 M.L.J. 57 (P.C)
31 (1894) I.L.R. 19 B. 809.
33 (1920) I L.R. 44 M 189 40 M.L.J. 46.
44 (1908) I.L.R. 33 B 88.

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quoted, apart from those referring to alienations by a widow, as applying entirely to matters of inheritance, *i e.*, continuity of line, divesting of an intermediate holder, fiction that the adoption is a deferred act by the father, that his life is prolonged in the widow, or that the adoption relates back, we shall find that all these fictions are simply introduced for the purpose of introducing a new heir into the succession, the ordinary rule being that when the succession opens, there must be, as so often pointed out in the decisions referred to above, somebody to take the property even if he is only a temporary or intermediate holder. There must, in a word, be somebody to catch the property when the previous holder relaxes his possession of it. So that, adoption regarded of course by Hindus, as of the extremest importance from both spiritual and temporal points of view, is really an exception to the rule that the successor must be in existence to take the property immediately the succession opens. The fact cannot but be recognised that there is in reality no such successor in the case of adoption by a deceased coparcener's widow, so that various devices and fictions have had to be invented to place the adopted son in the same position as a natural son, that being according to the texts and the judicial authorities his proper position. See *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji.*[15]

My opinion therefore is that the doctrine of relation back has nothing to do with a last male holder. It seems to me that a sole surviving coparcener has always been regarded as the owner of the coparcenary property. The theory of relation back has only to do with establishing a line of succession to the adoptive father and in order to establish that line, it is necessary that certain intermediate holders should give way to the adopted son's superior claims as that of a natural born son of his adoptive father. There are limits. We have seen some of them but I have not discussed all the cases in this connection regarding his power of divesting as for instance when the succession to the property gets into a collateral line. But within these limits, he can so to speak insist on the property devolving in a direct line as far as possible from father to son or from grandfather to grandson and it is in this connection and this alone that the doctrine of relation back and the cases I have quoted in the first category of inheritance are to be regarded. What authority there is with regard to alienations by a male

15. (1918) L.R. 46 I.A. 97: I.L.R. 43 B. 778· 36 M.L.J. 511 (P.C).

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holder is strongly, and it seems to me conclusively, against the contention argued by the appellant. We cannot conclude that the Privy Council in *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar*[26] were oblivious of their previous decisions and it seems to me that their Lordships must clearly be held to distinguish the case of interference with alienations from cases of divesting on the theory of relation back or any theory of continuity of succession or no hiatus in the line as they put it in *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*.[15]

For these reasons, I am of opinion that the learned Subordinate Judge was right and this Second Appeal must be dismissed. We think that each party should bear their own costs throughout.

Venkatasubba Rao, J.

Venkatasubba Rao, J.—I agree.

This appeal raises an important question, which may be stated in this form; when in a joint family, the property on the death of a coparcener is taken by the surviving member and he alienates it either wholly or in part, what are the rights of a son subsequently adopted by the deceased member's widow in regard to the alienations already made?

The facts of the case may be briefly stated. The 1st defendant and his son were the only members of a joint Hindu family. Before his death, the son (against the wishes of the father) gave his wife authority to adopt. In less than a month the son died and, on the fifth day after his death, the father settled all the joint family property on his daughters. The son's widow, about fifty days thereafter, made an adoption and the minor plaintiff is the adopted son. He filed the present suit against his adoptive grandfather (1st defendant) for partition of the joint family property. He impleaded the alienees and attacked the settlement and asked for a declaration that it was not binding upon him. While the suit was pending, the grandfather (the 1st defendant) died and the action was converted into one for possession of the entire property. The Lower Appellate Court disagreeing with the District Munsif dismissed the suit holding that the plaintiff is not entitled to impeach the alienation made before his adoption. The question is, what is the effect of the adoption on the settlement previously made?

15. (1918) L.R. 46 I.A. 97: I.L.R. 43 B 778: 36 M.L.J. 511 (P.C.).
26. (1927) I.L.R. 50 M. 508: 53 M.L.J. 57 (P.C.).

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The main contention advanced by Mr. Varadachariar for the appellant in his able and interesting argument is, that the adoption whenever made by the widow dates back to the death of her husband and that the rights of the adopted son must, subject to a narrow exception, be determined on that footing. He presents the same argument in another form. When a Hindu dies leaving a widow, the estate, by whomsoever it is taken, vests in that person only provisionally. If the intermediate holder (as the person in whom the estate vests is called) is no more than a provisional heir, it follows, Mr. Varadachariar contends, that his alienee cannot be in a better position than himself, the alienor. He puts his argument somewhat thus. The legal effect of an adoption made by a widow is that the adopted son devests the estate in the hands of a third party, whether that person is the widow herself or some other inferior heir. How can this devesting be accounted for except on the hypothesis that the adoption dates back to the death of the husband? The governing principle according to him is, that so long as there is the widow alive, there is potentiality of inheritance, for by making an adoption, she brings an heir into existence whose title is retrospective. According to the Hindu Law, he contends, there is no gap between the adoptive father's death and the adoption itself. This is said to rest on one of two fictions: the personality of the deceased husband may be supposed to survive in the widow (that is, the dead husband never died); or, the adoption may be antedated (that is, the non-existing person existed), the result in either case being, that there is no hiatus in the continuity of the line.

Our attention has been drawn to various passages either in judgments or text-books, which have recognised one or the other of the theories to which I have adverted. In *Mussamut Bhooban Moyee* v. *Ram Kishore Acharj Chowdhry*[1] the Judicial Committee after negativing the power of a mother to adopt on the death of her son leaving a widow observed thus at the close of their judgment at p. 312:

"An additional difficulty in holding the estate of the widow of Bhawani Kishore (the son) to be devested may perhaps be found in the doctrine of Hindu Law, *that the husband and wife are one, and that as long as the wife survives, one-half of the husband survives;* but it is not necessary to press this objection."

In *Krishna* v. *Sami*[39] the sons of a deaf and dumb member of an undivided Hindu family were held entitled to a share of

1. (1865) 10 Moo. I.A. 279.
39. (1885) I.L.R. 9 M. 64 (F.B.).

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the family estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather. Sir Charles Turner, C.J., in delivering the judgment of the Full Bench referred by way of analogy to the position of an adopted son and after citing *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*[6] observed thus:

"*The existence of valid power created a potentiality of inheritance* which may be likened to that of a son in the womb. The estate is taken conditionally."

This was referred to as an example in support of the conclusion that in certain cases the Hindu Law recognises devesting. Having thus cited the case of an adopted son as an instance, the learned Chief Justice, for further elucidation, compared an adopted son to a posthumous son.

In *Babu Anaji* v. *Ratnoji Krishnarav*[41] the adoption in regard to its effect was treated as *relating back* to the death of the adoptive father. The intermediate estate was referred to in the judgment as having vested *conditionally*. These are the observations that are now relied on by the appellant.

Then we come to two recent cases of the Privy Council on which he strongly relies. The first of them is *Madana Mohana Deo* v. *Purushothama Das.*[8] To understand the argument founded on this case, one has to turn to the pedigree given in the judgment. Their Lordships refer to the adoption of Brozo Deo *as relating back* to the death of Adikonda. Raghunada's succession is described as being *provisional* and *subject to defeasance* by the emergence of a male heir, to Adikonda. It is on these expressions that the learned counsel relies. We are not concerned in the present enquiry with the actual decision in the case or the reasons on which it rests; nor is it necessary to examine whether this case affects (as is suggested) the authority of any earlier rulings on the subject of adoption.

Now turning to the second Privy Council case, *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*,[15] the point actually decided was that an adopted son, quite as much as a natural son, would prevent the grant from reverting. In affirming the right of the adopted son, their Lordships proceed on the analogy of a posthumous son and observed at page 108:

"But it was admitted that a posthumous son would prevent the reversion If the widow happened to be *enceinte*, the reversion naturally

6. (1876) I.L.R. 1 M 69. L.R. 3 I A. 154 (P C).
8. (1918) L.R. 45 I.A 156: I.L.R. 41 M 855. 35 M.L.J. 138 (P C).
15. (1918) L.R. 46 I.A. 97· I.L.R. 43 B 778· 36 M.L.J. 511 (P C).
41. (1895) I.L.R. 21 B. 319.

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would remain in suspense until the birth of the child, to see whether it was a male or a female. It is futile, therefore, to say that the property reverts to the grantor's estate immediately the breath leaves the body of the Jivaidar."

From those observations found in the various judgments, can a principle of general application be deduced? Can it be inferred, for instance, that the position of an adopted son is in every respect similar to that of a posthumous son? To explain certain legal results, this theory of relation back has been adopted. Can it be accepted as an inflexible legal formula on the ground that every rule must be logically applied? The theory is, that a Hindu cannot be said to have died without male issue, until the death of the widow, makes adoption impossible; in other words, so long as the widow is alive, there is the possibility of an heir coming into existence. (West and Buhler, 4th Ed., p. 890, *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*[15]). Supposing this doctrine is carried to its logical results, what follows? The mere fact that the widow of a deceased member exists, hinders the male owner from dealing with, what is presumably, his own property. The widow may never adopt and yet the fetter is quite effectual. If the widow happens to outlive the surviving coparcener, the restriction on his power lasts till his death. With the conception that a widow has limited powers over property, the Hindu Law has made us familiar; but the doctrine we are now asked to accept leads to the starting result that the position of a male proprietor is infinitely worse than that of the widow under the Law. As Mayne observes:

"It would be intolerable that he (a Hindu proprietor) should be prevented from dealing with his own, on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of his rights which he obtained from one, who at the time was perfectly competent to grant them"—9th Ed., para. 198.

Granting that the alienee satisfies himself that the widow had no pre-existing authority from her husband to adopt, is he even then safe? She may adopt in the absence of her husband's authority in this province with the consent of the sapindas and in Bombay even without such consent. The result is, that in no circumstances can a male coparcener give a valid title so long as there is a widow in the family alive. Then again, in a joint family any one at his will may sever himself from his coparceners and deal freely with the property that falls to his share; but, according to the theory put forward, the last survivor, where a widow exists, is helpless and without a remedy. Is

15. (1918) L.R. 46 I.A. 97: I.L.R. 43 B. 778: 36 M.L.J. 511 (P.C).

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there anything that compels us to enforce a rule leading to such strange results? The contention seems on the contrary to be inconsistent with well-established principles of the Hindu Law. It is a normal incident of a joint family that a bare possibility of a concurrent interest coming into existence imposes no fetter on alienation. A sonless father enjoys power of alienation without restraint; with the son, the fetter comes into being and on his death the father's full rights re-emerge. But according to the contention advanced, the restriction depends not on the existence of a concurrent interest but upon the possibility of such an interest coming into being. That the rule Mr. Varadachari contends for, cannot be applied without some reservation, he himself is constrained to admit. Any alienation for a necessary purpose, he concedes, would be binding on the adopted son. This is scarcely consistent with his main argument; for, where is the question of a necessary purpose in the case of a provisional owner? In other words, he is willing to import into this branch of the law considerations pertaining to a Hindu widow's estate. He is driven again to suggest that the theory of provisional vesting may be confined to the possible share of the future adopted son. This is a conception unknown to the Hindu Law.

The doctrine of relation back has been discussed in several reported cases and the Courts have refused to extend its application. In regard to a widow's alienation, a different test is not applied in the case of an adopted son from what is applied in the case of a reversioner; her dealing with the property is not dealt with on the footing of her being the guardian of a possible adopted son. In *Lakshmana Rau* v. *Lakshmi Ammal*[29] the contention was put forward that the title of the adopted son related back to the death of the adopting widow's husband (*see* page 162). The learned Judges observe:

> "In the interval then between the death of her husband and the exercise of the power, the widow's estate is neither greater nor less than it would be if she enjoyed no such power or died without making an adoption She has the same power no greater and no less to deal with the estate Such acts of hers as are authorised and would be effective against reversioners will bind the son taken in adoption Such acts as are unauthorised and in excess of her powers may be challenged by the son adopted or by any other successor to the estate."

In that case *Bamundoss Mookerjea* v. *Mussamut Tarinee*[14] was referred to and treated as authority for the proposition

> "that an authority to adopt a son possessed by a widow does not supersede or destroy her personal rights as widow and that those rights continue in force until an adoption is actually made."

14. (1858) 7 Moo. I.A. 169. 29. (1881) I.L.R. 4 M. 160.

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In *Bhubaneswari Debi* v. *Nilcomul Lahiri*,[30] in the case of a succession to a collateral relation, the doctrine of relation back was not applied. It was laid down in that decision that an adoption after the death of a collateral does not entitle the adopted son to come in as an heir. In *Moro Narain Joshi* v. *Balaji Raghunath*[31] the question was whether the suit of the adopted son to recover possession was barred. Farran, J., after stating that under Art. 144 limitation runs from the date when the possession of the defendant becomes adverse to the plaintiff, observes:

"His adoption, however, does not relate back to the death of his adoptive father."

It was held that the suit was not barred by limitation. In *Harek Chand Babu* v. *Bejoy Chand Mahatab*[32] Mookerjee, J., examines the authorities on the subject fully and comes to the conclusion that the fiction that the adopted son was in existence at the death of the husband cannot be applied for the purpose of enabling the son to take the property as it stood at the moment of the death of the person to whom he was adopted by ignoring the previous acts of the adoptive mother or other persons whose estate is divested by the adoption. This point is discussed in connection with the question of limitation; but the observations made have a direct bearing on the present case The learned Judge says:

"He (the adopted son) cannot dispute the previous acts of the adoptive mother unless they were in excess of her legal powers as widow in possession, nor can he question the acts of a previous male holder in whom as a member of a joint Mitakshara family the property had vested as full owner and whose estate was divested by adoption"

In *Jagannadha Rao* v. *Ramayamma*[33] it was argued that a son adopted by a widow under authority stands in exactly the same position as a posthumous son and that in his case also the appointment of a testamentary guardian is incompetent. For this proposition reliance was placed upon the case already quoted, *Pratapsingh Shivsingh* v. *Agarsingji Rajasingji*.[15] Ayling, J., and my learned brother who heard the case repelled that argument. Mr. Justice Ayling made an observation with which I entirely concur:

"This process of argument is attractive, but we must be on our guard not to follow it too blindly"

15. (1918) L.R. 46 I.A. 97: I.L.R. 43 B 778: 36 M.L.J. 511 (P.C)
30. (1885) L.R. 12 I A. 137· I.L.R. 12 C 18 (P.C.).
31 (1894) I.L.R. 19 B. 809.
32. (1905) 9 C.W.N. 795.
33. (1920) I.L.R. 44 M. 189: 40 M.L.J. 46.

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In *Ganapati Aiyan* v. *Savithri Ammal*[45] a Hindu, shortly before his death, directed his widow to employ a part of his property in the upkeep of a charitable institution and at the same time empowered her to make an adoption. Accordingly, the widow, ten days after her husband's death, executed a document creating a charitable trust and some time later made an adoption. It was contended that the title of the adopted son related back to the date of his adoptive father's death, and that as the document was later, the alienation was not binding on the son. Subramania Aiyar, J., summarily rejects the contention remarking:

> "The first part of the contention may be dismissed from notice, for it it too late to question the doctrine that the adopted son's rights arise from the time of the adoption."

It is unnecessary to refer to the other cases cited, which have only an indirect bearing. The point directly arose in two cases. The first of them is *Sivagnanam Servaigar* v. *Ramaswami Chettiar*.[11] Arnold White, C.J., and Phillips, J., held that the adopted son took the property subject to the mortgage created by the intermediate holder. The passage from Mayne, which I have extracted above, is relied on by the learned Chief Justice. This case is a direct authority against the appellant's contention. The second case is *Maharaja of Bobbili* v. *Zamindar of Chundi*.[10] Some dicta in this case which are obiter are relied on for the appellant. The case relates to an impartible zamindari. Certain debts incurred by an intermediate holder were held binding on an adopted son who divested the former's estate. In that case, the learned Judges (Abdur Rahim and Krishnaswami Aiyar, JJ.) held on the facts that there was enquiry by the lender, which was reasonably sufficient to justify the loan so as to make it recoverable from the estate. As the debts were held to be binding on tihs limited ground, it became unnecessary to deal with the contention that was put forward, namely, that the intermediate holder was the full owner and therefore could deal with the property just as he pleased. The rival contention advanced was, that the intermediate holder occupied the position of the holder of a life-estate This contention was negatived and in the course of the judgment the following observation was made:

> "The analogy of the 1st defendant's (intermediate holder) estate is rather to that of limited owner like a *widow* than to that of a life owner"

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10. (1910) I.L.R. 35 M 108: 21 M.L.J. 593
11. (1911) 22 M L.J. 85.
45. (1897) I.L.R. 21 M. 10.

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It will thus be seen that in this case, although the learned Judges were inclined to hold that the powers of an intermediate holder were restricted, they did not decide the point, whether or not he possessed plenary powers. With the *obiter dicta* in this judgment, with great respect, I am unable to agree.

In the view I take, it makes no difference whether the alienation was or was not for value—though I may state that I regard the alienation in the present case as purely voluntary.

The appellant's contention is thus against principle and opposed to authority. It introduces, as Mr. Krishnaswami Aiyar has forcibly pointed out, a novel and perplexing rule into the law of adoption. It is too obvious to need mention that the conduct of the 1st defendant was morally wrong; but that cannot affect our decision.

The judgment of the learned Subordinate Judge is upheld and the Second Appeal is dismissed. Each party shall bear his costs throughout.

N.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—VISCOUNT DUNEDIN, LORD SHAW, LORD BLANESBURGH AND SIR JOHN WALLIS.

Shrimant Lakhamgowda Basavaprabhu Sar Desai .. *Appellant** (*Plff.*)

v.

Appanna *bin* Basaprabhu Iti and others .. *Respondents* (*Defts.*).

P. C. — Lakhamgowda v. Appanna.

Desai—Inam village of—Minor inams in—Kadim *or* jadid—*Evidence—Resumption of inams—Right of—Distinction between two cases*—Shet Sanadis *in village—Services to be rendered to Desai by—Personal services generally or services connected with administration of village in which lands held by them are situate—Evidence—Oral evidence in India—Unsatisfactory nature of, even as to recent happenings.*

In the case of a village held in inam, the right of resumption of lesser inams in the village which were *kadim* or in existence at the date when the village itself was granted in inam would be vested in the Government and not in the inamdar.

Held, on the evidence, that the defendants' inams were *jadid* or modern and not *kadim* or ancient

There is nothing in the definition of a *Shet Sanadi* (as given in Wilson's Glossary) to support the view that the services which were to be rendered by the person who held lands on that tenure were to be rendered in the village itself in which the lands so held were situate or were to be services connected with the administration of that village.

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*P.C. Appeal No. 19 of 1927. 27th Nov., 1928.

P. C.

Lakhamgowda v. Appanna.

Held, on the evidence, reversing the High Court, that the defendants (*Shet Sanadis*) who held minor inams created by the plaintiff's ancestors in the inam village of the plaintiff, a Desai, were liable to render to the plaintiff personal services generally.

It is not always easy in India to prove even recent happenings satisfactorily by oral evidence.

Appeal No. 19 of 1927 from the judgment and decree of the High Court, Bombay (MacLeod, C.J. and Crump, J.), dated the 5th January, 1925, reversing a decree of the First Class Subordinate Judge of Belgaum, dated the 1st June, 1922.

The material facts of the case are set out in their Lordships judgment.

Lowndes, K.C., *Raikes* and *Parikh* for appellant.

The respondents were not represented at the hearing.

27th Nov. 1928. The judgment of their Lordships was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—This is an appeal from a decree of the High Court at Bombay reversing a decree of the Subordinate Judge of Belgaum and dismissing a suit brought by the plaintiff, the Desai of Vantmuri, to eject the defendants from certain lands held by them on service tenure in the village of Nagannanoli in case of their not agreeing to render to the plaintiff the services claimed from them, and also for damages.

The important office of desai had formerly been hereditary in the plaintiff's family ; and Nagannanoli, one of the villages which had formed the watan or endowment of the office, had been confirmed to them in inam by the British Government after the office and its duties had ceased to exist.

According to the plaint, the plaintiff's inam lands in the village included three parcels, A, B, C, containing 7¼ bighas, 3¾ bighas and 7½ bighas respectively, of which A and B had been granted by the plaintiff's ancestor to one Shivappa Iti in Fasli 1180 (1769-70) and C had been granted to his son, Appanna Bhimanna Iti in Fasli 1247 (1836-7) for badal mushahira, or stipend in land for the services they might be called on to render in the desgat, or desai's district. The defendants' family had, it was alleged, continuously rendered service as a peon and a shagirti, or attender, until August, 1917, since which time, on the evil advice of the plaintiff's enemies, they had ceased to do him service.

The defendants in their written statement denied that their lands had been granted to them on these terms or that they had in fact rendered service as peons and shagirtis. They and their ancestors, they alleged, had all along been doing service at

Nagannanoli as sanadis, and were willing to continue doing so. In 1917 the plaintiff, with the evil object of depriving them of these lands, had required them to stay at Vantmuri, the village where he resides, and to do service in his house to which service he was not entitled. They denied that the grants mentioned in the plaint were genuine, and alleged that they held the suit lands as *kadim sarva* inams—that is to say, ancient revenue-free grants for village service—and that the plaintiff had no control over them or right to dismiss them or resume their lands, as they were under the control of the British Government.

The Subordinate Judge, in a lengthy judgment containing a full precis of the documentary and oral evidence, held that the defendants' inams in the village were not kadim, that the grants relied on by the plaintiff were genuine, and that the evidence showed that the plaintiff was entitled to the services which he claimed from the defendants and the defendants refused to render. He accordingly decreed the plaintiff's suit. This decree was reversed by the High Court on appeal. The learned Chief Justice, who delivered the judgment of the Court, accepted the genuineness of the grants relied on by the plaintiff, but held that the earlier grant was for rendering service as a village peon, and that the later grant did not show what service was to be rendered, but, he added:

"I think it is apparent from the record that these lands were to be held by the defendants' family in return for rendering services as *shet sanadis*, that is to say, they were to be servants in the village of Nagannanoli, not only to help in the administration of the village, but also to render services in connection with that village."

He went on to observe that the first defendant and his father had no doubt been rendering personal services on occasions to the desai, but that it could not be inferred that these services were other than voluntary. He was of opinion that the documentary evidence did not support the plaintiff's case, and that the oral evidence did not go further than to show that on occasions the first defendant and his father had rendered personal services. With these general observations he allowed the appeal and dismissed the suit.

In the unfortunate absence of the respondents, who are not represented by counsel, their Lordships have had to examine the whole record, both with the valuable assistance of the learned counsel for appellant and independently, and have arrived at a different conclusion as to the nature of the services the defendants were to render.

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It will be convenient in the first place to deal with the defendants' contention that their inams were kadim or in existence before the grant to the plaintiff's predecessors, which, if proved, would be fatal to the plaintiff's case. The question whether, when a village was held in inam, the lesser inams in the village were kadim or ancient, or jadid or modern, was of great importance in the inquiries which were held under the Governor-General in Council's Act (XI of 1852) for the adjudication of titles claimed to be wholly or partially rent-free in the Presidency of Bombay, because, if they were kadim or in existence at the date when the village itself was granted in inam, the right of resumption would be vested in the Government and not in the inamdar, as is correctly stated in the written statement. This question came before the Board in *Laxmanrao Madhavrao* v. *Shriniwas Lingo*.[1] Now it appears from Ex. 162, a village return furnished to Government in 1860-61, that there had been an inquiry by the revenue authorities—in all probability one of the inquiries for the purposes of the Act, which were being held throughout the Presidency—and that it had been decided that the inams of twenty *shet sanadis* in the village including the defendants were jadid (that is to say, modern) and not kadim and that the right of resumption was in the inamdar.

In their Lordships' opinion this document shows that the defendants' inams were not kadim; and the same result follows from the concurrent finding that they were created by the plaintiff's predecessors in 1770 and 1837. These grants, however, only cover lands A and C in the plaint, but Ex. 162 shows that in 1860-61 Appanna, son of Bhima bin Shevanna, the defendant's ancestor, was holding B as well as A as a *shet sanadi*, and there are not sufficient reasons for holding that it was held on a different tenure.

It being found then that the defendants' inams were jadid or created by the plaintiff's ancestors, the question is, were they created for purely village service or for personal service generally. It appears from the documents already cited that the defendants were described as *shet sanadis*, as found by the learned Chief Justice.

A *shet sanadi* in Wilson's Glossary is defined as

"One holding a *sanad* or grant of lands for military service, applied especially to a local militia acting also as police and as garrisons of forts:

1. (1927) L.R. 54 I.A. 380. I.L.R. 51 B. 830: 53 M.L.J. 475 (P.C.).

also an assignment or grant of revenue of land for certain services ; the assignment, as well as the office, may be hereditary."

There is nothing in this definition to support the view of the learned Chief Justice that the services were to be rendered in the village itself or were to be in connection with the administration of the village, nor is it in their Lordships' opinion in accordance with the evidence in the case.

The grant of 1770, Ex. 117, in favour of the defendants' ancestor, Itakari Shevanna, was made in succession to a pyadi, or peon who was removed, and would also seem to have been granted on peon service; but there is nothing to show that such service was to be confined to the village. In Ex. 118, the grant of 1837, the nature of the service is not specified. There is, however, in Ex. 175, a statement made by Basavaprabhu, the 1st defendant's father, in 1873, after the death of his father Appanna, that the inam lands (which appear from the measurement given to include the three parcels in the plaint A, B and C) had been continued to him by the sansthan, and that he alone did the service of the sansthan. The word *sansthan*, which is the same as *samastanam* in use on the east coast, means residence, and is a respectful way of speaking of persons of position such as a rajah, a zamindar or a desai. It is also used in speaking of a temple. The statement therefore is that the defendants' ancestor was in the service of the desai generally.

As regards the oral evidence, the learned Chief Justice has commented on the fact that it only shows that personal service was rendered by the 1st defendant and his father, but, as it appears from Ex. 175 already mentioned that the 1st defendant's grandfather died in 1873, or earlier, it would be unreasonable to expect oral evidence as to personal service having been rendered in his lifetime. It is not always easy in India to prove even recent happenings satisfactorily by oral evidence; but in this case we have the admissions of the 1st defendant as to the services rendered by his father himself and his son, the 2nd defendant. The correspondence no doubt shows that the 1st defendant did work for the plaintiff in his own village of Nagannanoli, and also used to be sent as a peon or messenger from Nagannanoli to Vantmuri, where the plaintiff resided. It is, however, also proved that the first defendant, who was one of the twenty *shet sanadis* in his village, did turns of service at Vantmuri, the plaintiff's headquarters. Further, the first defendant admits that he had a wife at Vantmuri, that he used to stay there doing service and that he used to serve there under the Chief Kharbari for two or three months at a time. The

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service consisted in sitting in the chavadi, going to Belgaum and bringing medicine, etc., bringing waseel (money) from villages, and taking letters and papers to other people. Whenever he stayed at Vantmuri, he did this service. That is to say, it was ordinary peon service.

He also had to admit that he went about with the plaintiff and his son to such places as Bombay, Poona and Bellary and rendered them personal service there. His own admissions therefore furnish strong corroboration of the plaintiff's evidence, and show in their Lordships' opinion that he was in the habit of rendering personal service to the plaintiff outside his own village of Nagannanoli though no doubt he was allowed to remain there for long periods and whilst there was employed to attend to the plaintiff's affairs, as appears from Exs. 94 to 99. He further makes the significant admission that he was one of twenty *shet sanadis* in the village, and that he was the only one who had ceased to do service. He states that he had spent Rs. 20,000 on the suit lands in sinking wells, etc., and it may well be that having risen in the world, he had become unwilling to go on rendering the customary services to the plaintiff.

On the other hand the fact that the plaintiff in his plaint only seeks to evict the defendants in case of their still refusing to render the customary services lends no support to the defendants' allegation that the suit was brought with a view of depriving the defendants of their lands.

There is one other consideration of a general character to which their Lordships will refer. As already stated, there are twenty *shet sanadis* in the village of Nagannanoli, who are in the service of the plaintiff and are not, as the defendants contended, village officers holding kadim inams and subject to the revenue authorities. The explanation would appear to be that the position of the plaintiff's ancestors as hereditary desais rendered it necessary for them, according to the custom of the country, to have a large retinue of peons and attenders in their service. That service, according to the definition of *shet sanadi,* in Wilson's Glossary, included military service which has since become obsolete, leaving them liable only to personal service of a non-military character; but there is no reason for supposing that either formerly or in recent times that service was confined to the village in which their inam lands were situated.

One further point remains to be dealt with. The 1st defendant in his evidence denies that more than one of the family rendered service at a time. The plaint claims that the

plaintiff is entitled to the services of two people and this is not denied in the written statement or in the grounds of appeal to the High Court. Looking at the pedigree set out in the Subordinate Judge's judgment, it appears that the grant of 1770 was made to Shevanna, the father of Bhima, and that the grant of 1836 was made to Bhima's son Appanna. As Bhima died about 1857, it is clear that both the father and son were rendering service at the same time under their respective grants, and the exhibits referred to in the Subordinate Judge's judgment show that this state of things continued until Bhima's death, since which time both inams have been enjoyed by the same people. The oral evidence as to rendering service by two members of the family is, no doubt, meagre; but there appears to be no sufficient reason for holding that the obligation to render service of two persons has come to an end.

In their Lordships' opinion the appeal must be allowed, the decree of the High Court reversed, and the decree of the Subordinate Judge restored with this modification that the defendants are to have three months from the date of the Order in Council in which to render the service to the plaintiff, and that the defendants do pay to the plaintiff his costs here and in the Courts in India. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD BUCKMASTER, LORD SHAW, LORD BLANESBURGH AND SIR JOHN WALLIS.

K. L. S. V. E. Annamalai Chetty .. *Appellant** (*Plff.*)

v.

K. L. S. V. E. Subramanian Chetty and others .. *Respondents* (*Defts.*).

Hindu Law—Joint family—Member of—Self-acquisitions by—Right of—Claim by other members thereto—Maintainability—Conditions—Partition—Suit for—Property joint family property or not in—Issue as to—Onus of proof as to—Laches—Presumption adverse from—Partition—Suit for—Delay in instituting—Denial of plaintiff's right in suit property and claim to it on ground of its being self-acquisition of defendant long before date of suit—Delay in case of—Evidence—Witness—Credibility—Trial Judge's opinion as to—Value of.

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*P.C. Appeal No. 124 of 1927. 9th Nov. 1928.

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A member of a joint undivided Hindu family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate.

The burden of proving, in an action for partition of joint family property, that any particular item of property is joint, primarily rests upon the plaintiff, though circumstances may readily cause the onus to be discharged.

Although time cannot run against a claim to partition joint family estate unless there has been definite exclusion, yet, where the question is whether property alleged to be joint family property is really such or is only the separate self-acquisition of the defendant, and it appears that the plaintiff instituted proceedings to assert his right in the property on the footing that it is joint family property only years after his right therein was openly and definitely challenged by the defendant, the delay in the institution of the proceedings raises a presumption against the plaintiff and justifies the inference that his claim is a stale claim.

Their Lordships necessarily attach much weight to the opinion of the Trial Judge that the evidence of a witness was unsatisfactory.

Appeal No. 124 of 1927 from a judgment and decree, dated the 26th January, 1926 of the High Court of Judicature at Madras (Coutts Trotter, C. J. and Ramesam, J.), reversing a judgment and decree, dated the 27th April, 1923, of the Court of the Subordinate Judge of Sivaganga.

The appellant and the first respondent are brothers, and the minor second and third respondents are the sons of the first respondent. The first Court came to the conclusion that there was some nucleus of ancestral property and decreed the appellant's claim in part. The High Court held that the property in the hands of the first respondent was his self-acquisition and that there was no nucleus and dismissed the appellant's suit. The judgment of the Court, which was delivered by Mr. Justice Ramesam, concludes as follows:—

"On the whole it seems to us that there is no definite proof by the plaintiff of any nucleus of joint family property which could have formed the basis of acquisition by the first defendant of the properties now possessed by him, and the plaintiff is not entitled to a decree."

Lowndes, K.C. and *Subba Row* for appellant.

De Gruyther, K.C. and *Narasimham* for respondents.

9th Nov. 1928. The judgment of their Lordships was delivered by

Lord Buckmaster.

LORD BUCKMASTER.—The appellant claims that he, his brother the first respondent, and his brothers' two minor sons who are the second and third respondents, together form a joint and undivided family governed by the *Mitakshara* law as administered in Madras, and consequently that a half share of a dwelling house and certain other property in the possession of the first respondent are joint estate. That the family is a joint

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family and that it still remains undivided is not in dispute; the real question is whether there exists any joint property in which the appellant would be entitled to share. The appellant and the first respondent are the sons of one Vairavan Chetty, who is stated in the evidence to have died in 1883, but is found by the Court to have died in 1886; the statement in the evidence may be a misprint, or it may be a misunderstanding—1886 appears to have been accepted as the date of his death. Apart from the two brothers the father left him surviving a widow and two daughters, but the only property which it is established that he possessed was a share or interest in a house along with his brother, and certain funds in respect of which the first respondent received Rs. 1,129-1-6 on the 6th March, 1899, and Rs. 580-11-0 on the 18th June, 1905. Beyond this and some vague reference about jewellery belonging to the widow, there is no evidence that he left any property at all. The first respondent was born in 1873 and was a lad of 13 years when his father died. The appellant was a mere child. In 1887 by a document which settled a dispute as to the division of the house, Rs. 220 was fixed as the price of the share of the father and this sum is stated in the award to have been paid to the first respondent. In 1888 a site for a new house was bought for Rs. 300 and upon it in 1890 a house was built, and was further enlarged in 1905. The house is now of considerable value and it is one of the items in which the appellant claims a half share. The appellant's brother appears from the earliest time to have engaged actively in business on behalf of money-lenders, and ultimately became a partner in some money-lending firm. The appellant originally claimed a share in the money so earned upon the ground that the business had been implemented from a nucleus of joint family estate. It is sufficient to say that, apart from the fact that the initials of the firm's name under which the first respondent trades is V. E. S. P. L., which is alleged to be a combination of V. E. denoting the father of the parties and S. P. L. the firm of N. A. S. P. L., there is no evidence whatever to warrant this claim, and their Lordships agree with the High Court in thinking these letters are an unsafe guide. A member of a joint undivided family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate. That part of the claim therefore wholly fails.

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So also in their Lordships' opinion does the claim in respect of the two sums of 1,129 and 580 rupees. The account furnished, showing expenditure of moneys approximately equivalent to these sums after their receipt, is sufficient at this lapse of time to discharge the respondent from any further obligation in respect thereof. The real difficulty is with regard to the house. Of direct evidence that its site was acquired or its structure built out of joint estate there is absolutely none. This is not surprising; the transaction took place forty years ago when the appellant was a mere child, and there seems no contemporary witness who had knowledge of the facts. It is, of course, true that the amount received for the share of the original family house is very near to the sum used for the purchase of the new site, and it is likely also that a sum available out of joint estate would have been used for this purpose. Beyond this it is impossible to go.

Now the family appears to have had no money and their needs must have been urgent for the widow had herself and three little children to look after apart from the respondent It is just as reasonable to suppose that the money was required and used for present necessities as that it was kept for twelve months and then with some slight addition used to purchase a new site. The matter is, however, complicated by further considerations; the new site is said to have been bought in the name of the first respondent. This is indeed accepted by the appellant, though the proper evidence of the fact is not forthcoming and it is difficult to see where the respondent acquired the money to enable him to make such purchase for himself. The account he gives is a striking one. He says that from 1885 to 1888 he had been away serving as an apprentice, and at the end received 500 rupees as a present out of which he purchased the site. The learned Subordinate Judge thought that his evidence was unsatisfactory and their Lordships necessarily attach much weight to such an opinion, but one of the reasons for doubting his evidence appears to their Lordships to be slender. The learned Judge says:

"The 1st defendant says he paid Rs. 300 out of this amount for effecting purchase of the site. He has undoubtedly given unsatisfactory evidence in regard to this matter. He would at one time state he brought all the Rs. 500 home from foreign parts when he returned and another time assert that he had deposited part of this amount (400 rupees) in S.S.A. firm and had drawn upon it for purchase moneys by means of a hundi from here As the plaintiff's Vakil put it, this hundi is important evidence for showing from whom moneys were drawn and why the same was required, and one would expect that, after moneys paid out, the hundi will have

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been reclaimed and secured as part of the title-deeds appertaining to the site purchased.''

It seems quite possible that a man might say he had brought home 500 rupees when in fact 400 were owing to him from a responsible firm, and the consideration that the *hundi* by means of which this sum was drawn was not produced does not seem convincing since it was not the *hundi* by which the purchase money was paid, but it was the means by which the respondent was put in funds to pay the price. Even if it were originally kept the effect of its non-production is weakened in effect by the lapse of time. The statement that it is incredible that the respondent was in service for three years before 1888 is more difficult, but in 1886 he appears to have been regarded as capable of giving a receipt for money, and in 1888 a conveyance is made in his name; their Lordships are strengthened in thinking that the early maturity of boys in that district does not cause the story to be as incredible as it would be here, since it is indeed accepted by a learned Judge having such intimate knowledge of native customs as Mr. Justice Ramesam. In these circumstances their Lordships would greatly hesitate before asserting against his experience their view of what it would be possible or probable for a boy to do in Rangoon. It may be added that the learned Subordinate Judge finds support for his doubt as to the respondents' evidence in the evidence of Annamalai Chetty, and if his evidence were accepted it would afford strong ground for disbelief in the respondents' tale, but the learned Subordinate Judge concludes his examination of this matter with the following statement:

''While I am not prepared to place much faith upon the evidence of P.W. 1, Annamalai, I still do think that first defendant's story of his present of Rs. 500 during a period of apprenticeship is quite unlikely ''

Unlikely it may well be, but their Lordships can find no sufficient material to enable them to differ from the High Court in holding it to be true.

If in fact the site was purchased by the first respondent out of his own moneys the rest of the matter becomes reasonably plain, because although there is evidence that the maternal grandfather furnished some of the material and that through him payments of the building were made, yet there is no evidence whatever to displace the defendant's tale that he in fact provided the money, nor having regard to his application to his business is there any reason to doubt that he could have obtained the funds. That the house was occupied by his mother until her death, his sisters until their marriages, and the appellant

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until he was outcast, is consistent with either view, and is certainly not critical against the respondent. The burden of proving in an action for partition of joint family property that any particular item of property is joint, primarily rests upon the plaintiff. Circumstances may readily cause the onus to be discharged, but in this case their Lordships think that this has not been done and that in the face of direct evidence accepted by the High Court they are not at liberty to speculate as to alternative possibilities. They must accordingly hold that the appellant has failed.

It only needs to be added that in 1905 the appellant sought to mortgage his share of the house. His right to do so was challenged and the mortgage money was returned. Following on that in 1906 he says: "Let the housework also go on, I have no idea at all to live therein," and in 1915 the defendant makes a public notice that the appellant had no power whatever to deal with the house, and it is not till 1919 that these proceedings were commenced. Although time cannot run against a claim to partition joint family estate unless there has been definite exclusion, yet the fact that in 1905 when his right to mortgage was challenged the appellant took no steps, strongly suggests that at that time when evidence might have been more readily available he had no great faith in the value of his claim. It is this that their Lordships think was meant in the High Court by the statement that the claim was stale. For these reasons they think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman, Walker & Shephard.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE THIRUVENKATACHARIAR.

Ayyaswami Aiyar .. *Appellant** (1*st Deft.*)

v.

Mahadeva Aiyar and two others .. *Respondents* (2*nd Plff. and Defts.* 2 *and* 3).

Ayyaswami Aiyar v. Mahadeva Aiyar.

Hindu Law—Widow—Adverse possession against—Effect of, on reversioners—Law under Limitation Acts of 1871, 1877 *and* 1908*—Decree against widow based on adverse possession—Effect against reversioners of*—Vaithialinga Mudaliar v Srirangath Anni, (1925) L.R. 52 I.A. 322: I.L.R. 48 Mad. 883: 49 M.L.J 769 (P.C.)*—Effect of.*

Adverse possession against a widow or other female heir does not bar the reversioners under the Limitation Acts of 1871, 1877 and 1908.

Per Phillips, J.—*Vaithialinga Mudaliar* v. *Srirangath Anni,* (1925) L.R. 52 I.A. 322: I.L.R. 48 M. 883: 49 M.L.J. 769 (P.C.) does not lay down a general rule that adverse possession against the widow, whatever its nature, is adverse to the reversioner, irrespective of the provisions of Art. 141 of the Limitation Act.

Per Thiruvenkatachariar, J.—The effect of the observations in *Vaithialinga Mudaliar* v *Srirangath Anni,* (1925) L.R. 52 I.A. 322: I.L.R. 48 M. 883: 49 M.L.J. 769 (P.C.) amounts to this: that a decree passed against a widow or other female heir which is otherwise binding against the reversioner under the rule in the *Sivaganga case* does not cease to be binding on him merely because it was passed on the ground of adverse possession against her which would be of no avail if the reversioner were himself the plaintiff.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in O.S. No. 49 of 1922.

Watrap S. Subramania Aiyar for appellant.

S. T. Srinivasagopalachariar for respondents.

The Court delivered the following

JUDGMENTS. *Phillips, J.*—The appellant is the 1st defendant in a suit brought by the plaintiffs as reversionary heirs of one Gurunatha Aiyar impleading numerous other defendants who have not appealed. The plaintiffs claimed to be the reversioners and this fact was disputed by the defendants but they only put plaintiffs to proof of it. P.Ws. 1 to 7 have all given evidence on the point and their evidence has been believed by the learned Subordinate Judge. Certain criticisms have been put forward in this Court which contain nothing of sufficient importance to discredit the testimony of the witnesses who have been believed by the Trial Judge who had the opportunity of seeing and hearing them give their evidence. It is also signifi- Phillips, J.

*Appeal No. 102 of 1926. 20th December, 1928.

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cant that defendants 1 to 3 were not prepared to go into the witness box and swear that the plaintiffs were not members of their family, a fact which must be within their knowledge. We must, therefore, accept the finding that the plaintiffs are reversioners.

The second finding of fact relates to the question of who was the last male holder. The plaintiffs say that Gurunatha Aiyar was the last male holder but the defendants contend that he predeceased his father, Chidambaram Aiyar, who was the last male holder. The evidence is all on one side, namely, that of P.Ws. 2, 4, 5 and 7, which is unrebutted by any evidence for the defendants. That evidence is also supported by some prior proceedings in Court where the question had been raised. The learned Subordinate Judge has believed these witnesses and we see no reason to differ from his conclusion.

The plaintiffs' case was that Gomathi Ammal, the widow of Gurunatha Aiyar, came into possession of her husband's property and surrendered the appeal items to her sister-in-law Kamakshi Ammal, and that there was no necessity for that surrender, and, consequently, the plaintiffs entitled to recover the properties now. The defendants first of all took the plea that Gurunatha Aiyar was not the last male holder but Kamakshi's father, Chidambaram Aiyar, from whom she, Kamakshi, inherited the property. In setting out their case in the written statement the plea that Chidambaram Aiyar was the last male holder comes first and then we come to para. 11:

"In the face of it, it is absurd to state in para. 6 of the plaint that Gomathi Ammal surrendered some of the properties to Kamakshi Ammal. There was no necessity for such a surrender either"

Thus ends their first plea. Para. 12 runs:

"Even if it should be proved that Gurunatha Aiyar died after Chidambaram Aiyar, inasmuch as the surrender was made to Subbalakshmi in the interest of her daughter Kamakshi Ammal and her heirs according to the arrangement made by the *dayadis* with their full consent and as the same has been admitted by the plaintiff and others, that arrangement is binding on them."

This paragraph is a clear admission that, if it should be proved, as has been done, that Gurunatha Aiyar died after Chidambara Aiyar there was a surrender by Gomathi Ammal as was also pleaded by the plaintiffs but not in precisely the same form for they alleged that the surrender was direct to Kamakshi Ammal whereas the defendants say that it was to Subbalakshmi Ammal on Kamakshi's behalf. On this plea it is incumbent on the defendants to show that the surrender was a valid surrender and

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their mere statement that the surrender was valid according to the arrangement made by the *dayadis* does not constitute a part of their admission that there was a surrender, but is a plea that even if there was a surrender that surrender was a valid surrender. It is, therefore, incumbent on the defendants to prove the validity of the surrender by the widow of portion of the husband's estate. No attempt whatever has been made to prove this. Therefore no question of adverse possession by the alienees can arise in this suit and that is apparently the reason why that question was not raised in the Lower Court.

Notwithstanding the pleadings, a very long argument has been addressed to us with a view to showing that the judgment in *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] is authority for holding that adverse possession against the widow is adverse possession against the reversioners. It is unnecessary to determine the question but I will refer to it briefly. The Privy Council in that case were considering the prior decisions relating to the prescription against a widow, more particularly the Sivaganga case, *Katama Natchiar* v. *The Raja of Sivaganga.*[2] After considering the connected cases their Lordships observe:

> "The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Sivaganga case*[2] as sound Hindu Law where that rule was applicable."

In the judgment the only passage where a reference to what the Sivaganga rule really is, is on page 899:

> "In *Hari Nath Chatterjee* v *Mothurmohun Goswami*[3] it was held that the rule in the *Sivaganga case* to the effect that an adverse decree against a Hindu widow binds those claiming in succession applies equally to the case of the daughter"

It would appear that the rule in the *Sivaganga case* referred to by their Lordships was as stated in that sentence and the words are very clear. It has been sought to extend that rule to all cases of adverse possession and that view has been accepted by one Judge of the Allahabad High Court, who formed the minority in a Bench of three Judges, which considered this question. It was also held by a single Judge of the Calcutta High Court, but the opposite view was taken by a Bench of the Calcutta High Court in *Siva Prosad Saw* v. *Sreemati Bhadramoni Dassi.*[4] With all respect I prefer to adopt the opinion of the majority and hold that *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] does not lay down a general rule that adverse possession

1. (1925) L.R. 52 I.A. 322: I.L.R 48 M. 883: 49 M.L.J. 769 (P.C).
2. (1863) 9 Moo. I.A. 539.
3. (1893) L.R. 20 I.A. 183: I.L.R 21 C. 8 (P.C).
4. (1928) 48 C.L.J. 368.

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against the widow, whatever its nature, is adverse to the reversioner irrespective of the provisions of Article 141 of the Limitation Act.

The appeal is dismissed with costs.

Thiruvenkatachariar, J.—I agree and I wish to add a few words on the question of limitation which was elaborately argued by the learned Advocate for the appellant. The plaintiff seeks to recover immoveable properties as the reversioner of Gurunatha Aiyar, who died in 1862, on the death of his widow Gomathi Ammal, which took place in 1919. *Prima facie* the article of limitation which applies to the suit is Art. 141 of the present Limitation Act, 1908, according to which the suit is in time as it is filed within twelve years from the death of Gomathi Ammal. It is, however, argued for the appellant that they and their predecessors were in possession of the properties adversely to Gomathi Ammal for more than twelve years. She then represented the estate of her husband Gurunatha Aiyar and the effect of her dispossession for more than twelve years was to extinguish her title to the property as the representative of the estate; in other words, that adverse possession for the statutory period of property inherited by a Hindu widow or other female taking a similar estate operates not only to extinguish her title thereto, but also the title of the reversioner who succeeds to the estate on her death. A reversioner, therefore, whose title was thus extinguished, is not one who is "entitled to the possession of immoveable properties on the death of a Hindu female" within the meaning of column 1 of Art. 141 and that Article does not therefore apply to a suit brought by him for possession of the immoveable property on the death of the female. In support of this contention, the learned Advocate for the appellant relies on the decision of the Privy Council in *Vaithialinga Mudaliar* v. *Srirangath Anni.*[1]

The respondents' Advocate, on the other hand, contends that the proposition that adverse possession against Hindu widow or other qualified Hindu female heir for the statutory period bars the reversioner also was the rule of law under the earlier regulations and the Limitation Act (XIV of 1859). But the legislature changed that rule in Act IX of 1871 by giving a fresh starting point of limitation for a suit by a reversioner to recover immoveable properties which he became entitled to on the death of the widow or other female heir, and that provision has been re-enacted in the later Limitation Acts of 1877 and 1908. Under Act

1. (1925) L.R. 52 I.A. 322: I.L.R. 48 M 883: 49 M.L.J. 769 (P.C.).

XIV of 1859 and the earlier regulations there was only one starting point of limitation for suits for the recovery of immoveable properties and that was from the time the cause of action arose. When immoveable property to which a Hindu widow or other female heir was entitled was held adversely to her, time began to run from the date the adverse possession commenced and the suit for the recovery of property whether brought by her or by the reversioner who succeeded to the estate after her would be barred unless it is brought within twelve years from that date. But Act IX of 1871 which repealed Act XIV of 1859 changed the law on the point by providing a special article under which the starting point for limitation for the suit by a reversioner arose on the death of the widow, the period of limitation for the suit being twelve years from the death of the widow. This provision was re-enacted in the later Acts and amplified by including in the first column other female heirs also who took the same qualified estate as a widow and on whose death the reversioner succeeded.

It is contended that the effect of this change in the law is that adverse possession against a widow which extinguishes her rights does not affect the rights of the reversioner as it did under Act XIV of 1859 and the regulations which preceded that Act.

Referring to the change made by Act IX of 1871 and the succeeding Acts, Mr. Rustomji observes as follows:

"A Hindu widow's estate and other estates analogous thereto are *for purposes of limitation* assimilated to an estate of an ordinary tenant for life. So, as no length of adverse possession against the tenant for life bars the reversioners, the same result follows in cases arising under Art. 141. The law allows the reversioner twelve years from the female heir's death and it is neither in her power nor in the power of any person claiming through or against her to abbreviate that period [Adverse possession cannot run against reversioners until after the death of the widow.] If the female heir never obtained possession on the owner's death and it was taken and continued by another person (in no way entitled to the property) adversely to her, the fact that she herself was barred by twelve years of such adverse possession against her will not preclude the reversioner from suing within twelve years of her death" *See* Rustomji's Limitation Act, 4th Ed., p. 726.

In my opinion this is a correct statement of the law as laid down by the several High Courts and the Privy Council in cases which arose under the Limitation Acts commencing from Act IX of 1871. *See also* Mayne's Hindu Law, 9th Ed., para. 643 at pages 951 and 952. The change in the rule of limitation made by Act IX of 1871 does not however affect any title which had been acquired by adverse possession before that Act came into force. See *Appasami Odayar* v. *Subramania Odayar.*[5]

5. (1888) L.R. 15 I.A. 167· I.L.R. 12 M. 26 (P.C).

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The question then is whether as contended for the appellant the Privy Council have in *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] re-affirmed even with regard to cases arising under the Limitation Acts of 1871, 1877 and 1908 the old rule which was applied to cases governed by Act XIV of 1859, namely, that adverse possession which bars a widow or other female heir also bars the reversioner.

A perusal of the judgment of their Lordships in that case shows that the decision against the plaintiff-reversioner on the question of limitation was based on Art. 129 of Act IX of 1871 and their Lordships expressly say that it is therefore unnecessary for them to make any formal pronouncement on the further question which was argued before them, namely, whether adverse possession which bars the widow bars the reversioner also. They however proceed to consider the authorities which were cited in support of that contention and, after doing so, observe as follows:—

"The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Sivaganga case*[2] as sound Hindu Law where that rule is applicable."

In the *Sivaganga case*[2] their Lordships held that the widow who inherits her husband's estate, though she has only a qualified interest therein, represents the estate absolutely for some purposes and that a decree fairly and properly obtained against her in regard to her husband's estate is in the absence of fraud or collusion binding on the reversionary heir.

In *Nobin Chunder* v. *Issur Chunder*,[6] in which the question arose under Act XIV of 1859, it was held following the *Sivaganga case* that as the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, they are also bound by limitation by which without fraud or collusion she is barred. This view was affirmed by their Lordships in *Aumirtolall Bose* v. *Rajoneekant Mitter*[7] which was also a case in which the question of limitation related to Act XIV of 1859.

After the passing of Act IX of 1871 the question as to the effect of adverse possession against a female heir as regards a suit brought by a reversioner for possession of the estate on her death was considered by a Full Bench of the Calcutta High Court

1. (1925) L.R. 52 I A. 322: I.L.R. 48 M 883: 49 M.L.J. 769 (P C).
2. (1863) 9 Moo I.A. 539
6. (1868) 9 W.R 505.
7. (1875) L.R. 2 I.A. 113.

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in *Srinath Kur* v. *Prosunno Kumar Ghose*.[8] In that case the reversioner was a daughter's son to whom Art. 142 of Act IX of 1871 did not in terms apply as he succeeded not on the death of the widow but on the death of the daughters of the last male owner. The learned Judges contrasting the provisions of the Act of 1859 with the corresponding provisions in the Acts of 1871 and 1877 held that the decision in *Nobin Chunder* v. *Issur Chunder*[6] which was passed under the Act of 1859 was no longer the law under the Acts of 1871 and 1877 and that a reversioner who succeeds to immoveable property has under the later Acts twelve years to bring his suit from the death of the female heir. The Full Bench case in *Srinath Kur* v. *Prosunno Kumar Ghose*[8] was followed by the other High Courts also as laying down the correct rule on the point decided therein. See *Ram Kali* v. *Kedar Nath*[9] and *Shrinivasa Raya* v. *Ramappa Hebbara*.[10]

All the other cases reviewed by their Lordships in *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] except the case in *Runchordas Vandravandas* v. *Parvatibai*[11] relate to the effect of decrees passed against widows, whether such decrees were passed against them in their representative character and hence binding on the reversioners under the rule in the *Sivaganga case*. It needs scarcely be observed that any decree passed against a widow or other female heir in her representative character will be binding on the reversioner also provided it was a decree fairly and properly obtained against her without fraud or collusion. If her title to any property alleged to belong to her husband's estate was negatived by such a decree, the reversioner being bound by the decree will fail, on the ground of *res judicata* if he sues for the recovery of the same property; the question is not one of limitation but of *res judicata*.

The case in *Hari Nath Chatterjee* v. *Mothur Mohun Goswami*,[3] which is one of the cases referred to by their Lordships, was one in which the reversioner's suit was held barred by *res judicata*. In that case the reversioner sued as heir of the last male owner on the death of the latter's last surviving daughter Sampurna. She had brought a suit for the recovery of the

1. (1925) L.R. 52 I.A. 322: I.L.R. 48 M. 883: 49 M.L.J. 769 (P.C.).
3. (1893) L.R. 20 I.A. 183: I.L.R. 21 C. 8 (P.C.).
6. (1868) 9 W.R. 505.
8. (1883) I.L.R. 9 C. 934 (F.B.).
9. (1892) I.L.R. 14 A. 156 (F.B.).
10. (1915) 30 I.C. 991.
11. (1899) L.R. 26 I.A. 71: I.L.R. 23 B. 725 (P.C.).

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properties against the person who was in possession thereof adversely to her and her suit was dismissed on the ground that it was barred by limitation. In the reversioner's suit it was contended that the plea of limitation which was successful against Sampurna was one which could not be raised against the reversioner having regard to Art. 142 of the Limitation Acts of 1871 and 1877 and that therefore the decree against Sampurna on a ground which was personal to her cannot bar the reversioner's rights. But their Lordships overruled the contention observing as follows:—

"The words 'entitled to possession of immoveable property' refer to the then existing law. Under that law the plaintiff being bound by the decree against Sampurna would not be entitled to bring a suit for possession."

With regard to this case both Mr. Rustomji and Mr. Mitra in their learned commentaries say that it creates an anomalous position

"for while, on the one hand, it has now been well established by all the Courts that no length of possession adverse to the female heir would bar the reversioner (who has twelve years reckoned from her death within which to sue), on the other hand, if she sues to recover the property from the person in adverse possession and fails in her suit, the reversioner is barred by the decree." *See* Rustomji's Limitation Act, 4th Ed., p 728 and Mitra's Limitation Act, Vol. II, 4th Ed., page 1035.

The same anomaly is referred to in the judgment of the High Court in that very case which was affirmed by their Lordships in *Hari Nath Chatterjee* v. *Mothur Mohun Goswami.*[3] But a reference to the facts of the case as stated in *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] shows that adverse possession against the daughter Sampurna commenced in 1855 when the widow Pearimoni died with the result that Sampurna's rights as representing the estate became barred by limitation under Act XIV of 1859 and under the then law, as held in *Nobin Chunder's case,*[6] the adverse possession which barred the daughter also barred the reversioner. If the reversioner is bound by adverse possession against the widow, a decree against her based on such adverse possession would *a fortiori* be binding on him. It seems to me that read in the light of the facts of the case, the reference to "the then existing law" as barring the reversioner's right is applicable as referring to the state of the law prior to the coming into force of Act IX of 1871 and in that view there will be no anomaly in the decision of their Lordships in *Hari Nath Chatterjee* v. *Mothur Mohun Goswami.*[3]

1. (1925) L.R. 52 I.A. 322: I.L.R. 48 M. 883: 49 M.L.J. 769 (P.C).
3. (1893) L.R. 20 I.A. 183: I.L.R. 21 C. 8 (P C).
6. (1868) 9 W.R. 505.

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The only other Privy Council case considered by their Lordships which I need refer to here is the case in *Runchordas Vandravandas* v. *Parvatibai*[11]. That case has been regarded by all the High Courts as definitely laying down that under the Acts of 1871 and 1877 limitation "can never begin to run against a reversioner in consequence of any possession or dispossession of a female, so long as she holds as heir of the last male." *See* Mayne's Hindu Law, 9th Ed., p. 952.

In *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] in considering *Runchordas Vandravandas* v. *Parvatibai*[11] Sir John Edge observes that in that case the widows of the last male owner did not represent the estate of their husband as they were content to hold under his will, the validity of which they did not question and that the estate was really represented by the executors of their husband's will and so though the possession of the executors was adverse to the real title of the widows, adverse possession against the latter cannot bar the reversioner under the rule in the *Sivaganga case* as the widows did not represent the estate. In *Runchordas Vandravandas* v. *Parvatibai*[11] the last male owner died in 1869 and the case was therefore governed by the Limitation Acts IX of 1871 and XV of 1877. A perusal of the judgment of their Lordships in that case and of the arguments which were advanced before them by the learned counsel on both sides shows that their Lordships rested their decision on the question of limitation upon Art. 141 of Act XV of 1877 which entitled the reversioner to bring his suit within twelve years from the death of the female. Their Lordships also held that Art. 144 which makes the time begin to run from when the possession of the defendants became adverse to the plaintiff is not applicable where the suit is otherwise specially provided for, as in this case by Art. 141. Then as regards the contention based on section 28 of the Limitation Act, their Lordships say that though the title of the widows may be extinguished by the adverse possession of the executors, the reversioner's title was not, as he does not derive his right from or through them, and the extinguishment of their right would not extinguish his. This case has ever since been treated as settling the question that adverse possession against a widow or other female heir does not bar the reversioner under the Acts of 1871, 1877 and 1908.

In *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] itself, the plea of limitation was also based on adverse possession against the

1 (1925) L.R. 52 I.A. 322: I.L.R. 48 M. 883: 49 M.L.J. 769 (P.C.).
11. (1899) L.R. 26 I.A. 71: I.L.R. 23 B. 725 (P.C.).

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widow Chokkammal held by her adopted son and those claiming from him from 1862 to 1884 as barring her rights as well as those of the reversioner. In 1884 Murugathal, one of the defendants in the suit, who was in possession as the heir of the adopted son, was dispossessed by the widow Chokkammal. Murugathal thereupon brought a suit against Chokkammal for possession of the properties which she was dispossessed of, maintaining that the adoption by Chokkammal of her husband was valid and that even if it was invalid she had acquired a title by adverse possession. In that suit the adoption of Murugathal's husband was held to be invalid, but she was given a decree for possession on the ground of her having acquired title to the property by adverse possession against the widow Chokkammal.

In the subsequent suit brought by the reversioner in which Murugathal and others claiming under her were impleaded as defendants, one of their main pleas was that the decree against the widow Chokkammal in Murugathal's suit operated as *res judicata* against the plaintiff in respect of his claim in the suit. With reference to that plea their Lordships were inclined to the view that though the adoption was invalid, the decree in favour of Murugathal would be binding on the reversioner under the rule in the *Sivaganga case*. But the main point on which the suit of the reversioner was dismissed was that it was barred under Art. 129 of Act IX of 1871 and that the title of Chokkammal and those claiming after her had under that article as held by the Privy Council in *Jagadamba's case*[12] become extinguished before Act XV of 1877 came into force. It seems to me that the effect of their Lordships' observations in *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] amounts to this: that a decree passed against a widow or other female heir which is otherwise binding against the reversioner under the rule in the *Sivaganga case* does not cease to be binding on him merely because it was passed on the ground of adverse possession against her which would be of no avail if the reversioner were himself the plaintiff. It may be that the result may be anomalous as has been observed with reference to *Hari Nath Chatterjee* v. *Mothur Mohun Goswami*[3] that the reversioner is affected by the widow suing the trespasser and failing in her suit, but he is not affected if she remains inactive and takes no steps to recover the property from the trespasser.

1. (1925) L.R. 52 I.A. 322: I L.R. 48 M. 883: 49 M.L.J. 769 (P.C)
3 (1893) L.R. 20 I.A 183: I.L.R. 21 C. 8 (P.C.)
12. (1886) L.R. 13 I.A. 84: I.L.R. 13 C. 308 (P.C.).

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In the case before us, there is no question of any previous decree against the widow and the contention rests merely upon adverse possession against the widow. The evidence does not show when adverse possession against Gomathi Ammal commenced; but even assuming that such adverse possession commenced on the death of Gurunatha Aiyar, Gomathi Ammal's rights as representing the estate were not barred when Act IX of 1871 came into force. Unless it was so barred, the plaintiff's suit is within time as Gomathi Ammal died only in 1919.

The view I take as to the effect of *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] is in accordance with that of the majority in the Full Bench case in *Bankey Lal* v. *Raghunath Sahai*[13] and that of the Calcutta High Court in *Siva Prosad Saw* v. *Sreemati Bhadramoni Dassi.*[4]

Aurabinda Nath Tagore v. *Manorama Debi*,[14] which is a decision of a single Judge, was also relied on on behalf of the appellant. This was a case relating to trust properties. The female heir in that case who had been dispossessed of property for more than twelve years was entitled thereto not as the heir of the last male owner but as the trustee of the properties, in which capacity there is hardly any difference between a male trustee and a female trustee. See *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik.*[15] That case has no bearing on the point and the observations of the learned Judges as to the effect of *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] with which I am unable to concur, are *obiter*.

I am, therefore, of opinion that the learned Subordinate Judge was right in holding that this suit is not barred by limitation.

A.S.V. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, MR. JUSTICE ODGERS AND MR. JUSTICE BEASLEY.

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The Commissioner of Income-tax, Madras .. *Petitioner**

v.

Messrs. Massey & Co., Ltd., Madras .. *Respondents.*

Income-tax Act (XI of 1922), S. 10 (2) (vi)—Depreciation in respect of "buildings, etc"—Allowance on account of—Claim to—If personal—Purchase

*O.P. No. 138 of 1928. 29th November. 1928.

1. (1925) L.R. 52 I A. 322: I.L.R. 48 M. 883: 49 M.L.J. 769 (P.C).
4 (1928) 48 C.L.J. 368. 13 A.I.R. 1928 A. 561 (F.B.).
14. (1928) I.L.R. 55 C. 903 15. (1904) I.L.R, 28 M. 197.

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by one company of another as a going concern—Allowance on account of depreciation in respect of "buildings, etc"—Claim of latter to—Right of former to benefit of—Calculation of depreciation—Basis proper of—Res judicata—*Income-tax proceedings—Inapplicability to.*

The petitioner company (the new company), a company incorporated under the Indian Companies Act, purchased the business of another company (the old company), also incorporated under the Indian Companies Act, as a going concern as from 1st January, 1924. The petitioner company thereafter carried on the business formerly carried on by the two companies—the petitioner company and the old company. In 1926 the petitioner company claimed a deduction on account of depreciation in respect of the buildings, machinery and plant that belonged to the old company, to which deduction the old company would have been entitled under S. 10 (2) (vi) of the Act if it had carried on business, to which effect was not given during the period of the existence of the old company, and which the petitioner company had no opportunity of claiming before

Held, (1) that the deduction on account of depreciation was not personal to the old company and that the petitioner company was entitled to it, and

(2) that the calculation of the depreciation must be made on the original cost to the old company and not on the value at which the buildings, machinery and plant were taken over by the petitioner company.

The principle of *res judicata* is inapplicable to income-tax proceedings.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under S. 66 (2) of the Indian Income-tax Act (XI of 1922).

2. Messrs. Massey and Company (hereinafter referred to as the petitioner Company) object to an assessment made on them for the year commencing the 1st April, 1927 on a net income of Rs. 1,19,578.

3. The following facts were proved or admitted:—

(a) The petitioner Company is a Company incorporated under the Indian Companies Act. It owned lands and buildings at Tondiarpet, Madras, and there carried on business as Engineers and iron founders and dealers in oil engines, machines and general hardware.

(b) The Madras Engineering Works (hereinafter referred to as the old Company) was another company incorporated under the Indian Companies Act. It owned lands and buildings at Royapuram and there carried on business almost similar to that carried on by the petitioner Company, with the addition of a department which dealt with in printing machines and types.

(c) The petitioner Company carried on a fairly prosperous business, whereas the old Company which had come into being mainly for the purpose of taking over a business which was previously being carried on under the style of "The Madras Engineering Works" (Messrs. Oakes & Co., Ltd., Proprietors) incurred losses in its business from the date of its inception in 1920 with

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the result that according to its Balance Sheet as on 31st December, 1923 it had suffered a net loss of over Rs. 5,00,000.

(*d*) At the end of 1923 the Directors of the old Company with a view to eliminate the competition of the petitioner Company acquired a controlling interest in the shares of the petitioner Company and arranged for the amalgamation of the two businesses carried on by the petitioner Company and the old Company respectively.

(*e*) By a resolution of the Directors, dated 5th January, 1924, the petitioner Company resolved to purchase the business of the old Company as a going concern as from 1st January, 1924 for the consideration following, *viz.*:

"Rs. 10 lakhs of ordinary shares in Massey & Co, Ltd. (petitioner Company) issued as fully paid up to the nominees of the Madras Engineering Works, Ltd. (old Company); Rs 32,000 and Rs. 3,76,000 being the consideration of the land and buildings respectively; Rs 3,52,000 being the consideration for the moveable plant consisting of machinery, etc.; Rs. 2,00,000 fixtures and fittings; Rs 70,000 loose tools; Rs. 18,000 motor cars and launches; Rs. 14,000 electrical plant; Rs. 50,000 and Rs. 2,40,000 being the consideration for the remaining assets after providing for liabilities and expenses."

The petitioner Company has since that date been carrying on the business formerly carried on by the two companies—the petitioner Company and the old Company.

(*f*) The original cost of the buildings, machinery and plant of the old Company as on 31st December, 1923 amounted to Rs. 7,97,453 and on this amount the old Company was entitled if it carried on business to claim an allowance on account of depreciation under section 10 (2) (vi) of the Income-tax Act. In the years of account (calendar years) 1920, 1921, 1922 and 1923 the business of the old Company had resulted in losses and no allowance on account of depreciation had therefore been given to it. The total amount of depreciation that the old Company was entitled on 1st January, 1924 to carry forward under proviso (*b*) to section 10 (2) (vi) of the Income-tax Act and claim as a deduction against its profits chargeable to income-tax in the following years was Rs. 1,38,984.

(*g*) The business of the old Company was purchased by the petitioner Company, as stated above, on 1st January, 1924. The assessment on the old Company for the year 1924-25 (based on the profits of the calendar year 1923) was therefore made on the petitioner Company as successor within the meaning of section 26 of the Income-tax Act though the assessment did not result in any tax becoming payable. In the assessment made on the petitioner Company for the same year, the petitioner Company was further allowed a set-off for the trading losses of the old Company against its own taxable profits. A copy of the order of the Commissioner under section 33, dated 24th March, 1925 is filed marked Ex. A.

(*h*) The business of the petitioner Company resulted in a loss in the calendar year 1924. No assessment was therefore made on it in the year 1925-26 and it was further permitted to carry forward the depreciation due to it for that year as a deduction against its profits in the following year.

(*i*) In the year 1925 the petitioner Company made a profit of Rs. 1,39,144 but again no assessment was made on the company in the year 1926-27 as it was found that the deduction on account of depreciation due for that year and that carried forward from the preceding year together exceeded the profits that arose to the Company.

4. During the year 1926 the profits and gains that accrued to the petitioner Company from its business amounted to Rs. 2,08,512. This profit it admitted for the assessment of the year 1927-28 but claimed a sum of Rs. 2,41,924 as a deduction on account of depreciation due to it, as shown under—

	Rs	Rs.
(*i*) Deduction on account of depreciation in respect of the buildings, machinery and plant that belonged to the old company and to which effect was not given during the period of its existence [*see* para 2 (*f*)] .	.	1,38,784
(*ii*) Depreciation due in the assessment of 1925-26 to which effect was not given owing to there being no profits chargeable for that year ..	81,360	
Depreciation due in the assessment of 1926-27 ..	80,404	
	1,61,764	
Deduct amount allowed in the assessment of 1926-27 ..	1,39,144	
		22,620
(*iii*) Deduction on account of depreciation in the assessment of 1927-28 ..	..	80,520
		2,41,924

The depreciation worked by the petitioner Company for the years 1925-26, 1926-27 and 1927-28 (years of account 1924, 1925 and 1926) was based, in respect of the buildings, machinery and plant taken over from the old Company on their *original cost to the old Company* and not on their *original cost to the assessee,* i.e., the petitioner Company.

On the basis of the figures contained in the preceding paragraph the petitioner Company contended that no assessment should be made on it for the year 1927-28 and further claimed that it should be permitted to carry forward a sum of Rs. 33,412 being the allowance for depreciation which could not be given effect to in the assessment of that year.

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5. The Income-tax Officer held:

(i) that the depreciation due to the old Company was personal and that the petitioner Company though it was liable as successor to the business of the old Company to pay the tax due by the old Company in the year of succession was not entitled to any deduction on account of depreciation which the old Company could have claimed had it been in existence, and

(ii) that the depreciation due to the petitioner Company on account of buildings, machinery, plant, etc., taken over from the old Company should be worked out on the basis of the cost *to the assessee*, i.e., to the petitioner Company and not on their original cost to its predecessor; such cost was ascertainable from the terms of the Resolution, dated 5th January, 1924—*see* paragraph 2 (*e*) above.

He accordingly worked out the depreciation due to the petitioner Company as under:

	Rs.
Depreciation for the year 1924 not given effect to in the assessment of the year 1925-26 ..	75,928
Depreciation for the year 1925 ..	75,263
	1,51,191
Depreciation allowed against the profits of the year 1925 in the assessment of 1926-27 ..	1,39,144
Balance to be carried forward .	12,047
Depreciation for the year 1926 to be allowed in the assessment of 1927-28 ..	76,887
Total depreciation due ..	88,934

Deducting this amount from the profits of the petitioner Company for the year 1926, *i.e*, Rs. 2,08,512, the Income-tax Officer assessed the petitioner Company on the balance of Rs. 1,19,578.

6. The petitioner Company appealed against the assessment and contended *inter alia*—

(*a*) that it should be allowed the depreciation which was due to the old Company and to which no effect could be given during the period of its existence, and

(*b*) that the depreciation on the buildings, machinery and plant taken over by it from the old Company should be worked out on the basis of their original cost to the old Company and not on the value at which they were taken over by it.

The Assistant Commissioner agreed with the conclusions of the Income-tax Officer and dismissed the appeal. His order is filed marked Exhibit B.

7. The petitioner requires me to state a case and refer for the decision of the High Court the following questions of law

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that arise out of the order of the Assistant Commissioner under section 31:–

(1) Whether Messrs. Massey & Co., Ltd., who succeeded to the business of the Madras Engineering Works, Limited, are entitled to carry forward for the purposes of assessment depreciation to which full effect could not be given in the years previous to the succession by Massey & Co., Ltd.

(2) Whether Messrs. Massey & Co., Ltd. can be allowed to calculate depreciation on assets taken over from the Madras Engineering Works, Limited on the original cost of those assets to the latter or at the value at which they were taken over by Messrs. Massey & Co., Ltd.

(3) Does the order, dated 24th March, 1925 under section 33 of the Income-tax Act operate as *res judicata* so as to prevent that decision from being re-opened in assessments made in years subsequent.

My opinion on these questions is as follows:—

Question 1.—Under section 10, sub-section (2), clause (vi) of the Income-tax Act, in computing the profits and gains of his business an assessee is entitled to an allowance on account of depreciation in respect of "buildings, machinery, plant or furniture being his property." The depreciation now claimed by the petitioner Company is what was due to the old Company before the succession. The buildings, etc., for which the old Company were then the owners were not therefore used in the business of the petitioner Company nor were they the property of the petitioner Company within the meaning of clause (vi) to sub-section (2) of section 10 during the years for which depreciation is now claimed. In my opinion the deduction on account of depreciation is personal to the persons who carry on the business and as the petitioner Company did not carry on the business of the old Company during the years for which it now claims depreciation its present claim is inadmissible.

Question 2.—Section 10, sub-section (2), clause (vi) of the Income-tax Act on which the petitioner Company bases its claim enacts that an allowance for depreciation in respect of buildings, machinery, etc., should be made in a sum equivalent to such percentage of the *original cost to the assessee* as may be prescribed. The assessee in this case (and the person who claims the allowance on account of depreciation) is the petitioner Company and the original cost to it of the buildings, machinery, etc., taken from the old Company is the cost at which it authorised its Directors to purchase them from the old Company and at which they are valued in its accounts. In my opinion the petitioner Company is entitled to claim depreciation only on the cost of those assets which it

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has paid and not that at which they were purchased by the old Company.

Question 3.—*Res judicata* presupposes that there are two opposing parties, that there is a definite issue between them, that there is a tribunal competent to decide the issue and that within its competence the tribunal has done so. In a proceeding before an Income-tax Officer none of these various elements which are necessary for the application of the principle of *res judicata* are to be found and in my opinion the doctrine cannot be applied to income-tax proceedings.

M. Patanjali Sastri for petitioner.

Nugent Grant instructed by *Messrs. Short Bewes & Co.* for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS. *Coutts Trotter, C. J.*—The only question I propose to ask myself in this case is whether or no there is anything to distinguish it from the Scottish case of *The Scottish Shire Line, Limited* v. *Lethem.*[1] That was a very strong Court consisting of the Lord Justice Clerk, Lord Dundas, Lord Salvesen and Lord Guthrie. Therefore I should feel myself constrained and do feel myself constrained to follow those eminent Judges unless it can shown that there is either something on the facts to distinguish this case from that or that there is a material variation in the language respectively of the Indian and the corresponding English section. I say advisedly material because Indian draftsmen for some reason are always making little changes of language which do not mean anything at all vital to the true construction of the Act. With regard to the facts I am unable to see that anybody could argue that there is the slightest distinction between the relation of Massey & Co., Ltd. here to the Madras Engineering Works and the relation between the Scottish Shire Line, Limited and the Elderslie Steamship Co., Ltd. of the Scottish case.

The only other question is, can we find any difference between the language of the Indian Act, with which we are concerned and the language of the Finance Act, 1907, on which the Scottish case was a decision? I am not going to read the two sections at length. It is sufficient to say that I have scrutinised them very carefully with the aid of counsel and that I am quite clearly of opinion that there is no material difference in the language and that, whatever was intended to be effected, the

1. (1912) 6 Tax Cases 91.

F. B.

The Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras.

Coutts Trotter, C.J.

scope of the Indian Act is absolutely the same as that of the English Act. I am therefore of opinion that this case is quite indistinguishable from the Scottish case and that the reasoning of the learned Judges there apply directly to our case. One consideration to which I am referring is put forward in Lord Guthrie's judgment at page 100. What he says is this:

"It appears to me that the argument of the Surveyor of Taxes has neither probability nor equity in its favour, because he proposes to treat the appellant company as identical with or as the successors of the Elderslie Steamship Co., Ltd. (called the old company in the case) for one revenue purpose, and neither as identical with nor as the successors of the old company for another and not remotely related revenue purpose"

Similar passages are to be found in the other two learned Judges' judgments. That to my mind is precisely what the Income-tax Officer is trying to do in this case and for the reasons given by the Scottish Court I decline to accede to that course being adopted. The answer therefore to the first question is in the affirmative; the answer to the second is that the calculation must be made on the original cost to the Madras Engineering Works and not on the value at which the buildings, machinery, etc., were taken over by Massey & Co. The answer to the third is in the negative.

The Crown will pay Rs. 250 costs to the assessees and refund Rs. 100.

Odgers, J.—I agree.

Beasley, J.—I agree.

A.S.V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE THIRUVENKATACHARIAR.

Kamireddi Timmappa .. *Appellant* (Counter-petitioner—Surety)*

v.

Devasi Harpal trading as Ratilal Khimji of Bombay by duly authorised agent Ram Das Bhimji .. *Respondent (Petitioner—29th Creditor).*

Kamireddi Timmappa v. Devasi Harpal.

Provincial Insolvency Act (V of 1920), Ss 37, 28, 29 and 39—Composition scheme—Approval of, and annulment of adjudication in consequence—Creditor named in Insolvency Petition schedule but not included in composition scheme schedule—Right of, after annulment of adjudication but before payment of final dividend, to prove his debt, to have his name included in composition schedule scheme, and to get a dividend—Surety upon

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*C.M.A. No. 414 of 1927. 25th October, 1928.

whose bond composition scheme was based—Right of, to object to order of Court allowing such creditor to prove his debt, including his name in composition scheme schedule, and paying him a dividend—Undertaking by him in surety bond agreeing to Court so ordering—Effect.

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In a case in which a person had been adjudged an insolvent, a composition scheme in which all creditors named in the Insolvency Application were to be paid at four annas in the rupee was approved by the District Judge and the adjudication was annulled. The scheme was based on a surety bond given by the appellant, by which the surety undertook to pay the creditors named in the scheme schedule the four-anna dividend provided by the scheme, and also to pay into Court such sums as the Court ordered to be paid to such creditors as the Court thereafter brought on to the scheme schedule. In consideration of his surety bond the assets of the insolvent were handed over to the appellant The respondent was a creditor whose name appeared in the original insolvency petition schedule but who had not been served with notice of the scheme. On an application made by him subsequent to the annulment of the adjudication, the District Judge allowed him to prove his debt on foot of the composition scheme, ordered his name to be included in the scheme schedule, and directed the surety, the appellant, to pay him his four-anna dividend.

Held, that the order of the learned Judge was right.

Although the annulment of adjudication puts an end to the insolvent's state of insolvency, it does not, in cases such as are contemplated by S 37 of the Provincial Insolvency Act where the Court still retains control of the insolvent's assets, put an end to the insolvency proceedings within the meaning of S. 28 of the Act All creditors named in the insolvency petition schedule are bound by a composition which has been approved by the Court and must come in on foot of it and cannot have any remedy *de hors* the insolvency proceedings. Any creditor is entitled, unless the Court thinks his application is unduly delayed, to prove his debt at any time before the final dividend has been paid, and will, when he proves his debt, be admitted on foot of the composition to have his name added to those already in the scheme schedule under S 29 of the Act and get his dividend at the same rate so far as there are still assets available for distribution.

Per Wallace, J—It is implicit in the contract under the appellant's surety bond that the inclusion of other creditors in the scheme schedule by the Court shall be in accordance with law, and it is open to the appellant to contend that the inclusion of a particular creditor in the scheme schedule and that the consequent order of the Court that the appellant shall pay him a dividend are contrary to law and should be annulled.

Per Thiruvenkatachariar, J.—In the face of the explicit undertaking by the appellant in his surety bond he cannot contend that he undertook to pay the dividend to those creditors who proved their debts before the order accepting the composition and annulling the adjudication was passed under S. 39 and whose names were included in the schedule annexed to the said order.

Appeal against the order of the District Court of Bellary, dated the 19th August, 1927 and made in I.A. No. 739 of 1926 in Insolvency Petition No. 9 of 1921.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for appellant.

V. S. Narasimhachari for respondent.

The Court delivered the following

Wallace, J.

JUDGMENTS. *Wallace, J.*—This appeal is against the decision of the District Judge of Bellary in an insolvency matter. The

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facts necessary to be set out are: In I.P. No. 9 of 1921 one Karugodu Seenappa Chetti was adjudged insolvent on 26th October, 1921. On 22nd December, 1925 a composition scheme in which all creditors named in the I.P. were to be paid at four annas in the rupee was approved by the Court and the adjudication was annulled. The scheme was based on a surety bond given by the present appellant, the effect of which will be considered later. By that date 16 out of 36 creditors named in the I.P. had proved their debts and were included in the scheme schedule. The present respondent was one of those who had not then proved his debt. The surety undertook to pay the creditors named in the scheme schedule the four-anna dividend provided by the scheme, and also to pay into Court such sums as the Court ordered to be paid to such creditors as the Court hereafter brought on to the scheme schedule. In consideration of his surety bond the assets of the insolvent were handed over to the appellant. On 20th December, 1926 the present respondent, whose name appears in the original insolvency petition schedule, applied to be allowed to prove his debt on foot of the composition scheme to be included among the scheme schedule creditors and to be given a dividend thereon at four annas in the rupee. The District Judge found that notice of the scheme had not been served upon him, allowed him to prove his debt, ordered his name to be included in the scheme schedule, and directed the surety, the appellant, to pay him his four-anna dividend. The appellant appeals. His main contentions are that it is contrary to law for the Court to allow a creditor to prove his debt after the adjudication has been annulled in consequence of a composition scheme, that with the annulment the insolvency proceedings came to an end and therefore the Court is no longer functioning as an Insolvency Court and that the creditor's only remedy is under the ordinary law, the insolvent being no longer entitled to the protection of the Insolvency Court. Each of these contentions is open to attack and will be dealt with in detail.

I will first however deal with a contention advanced on behalf of the respondent that, apart from these points of law the contract between the appellant and the Court embodied in his surety bond is an absolute answer to the appellant. Under that bond, which was executed on 30th November, 1925, the surety bound himself to pay to the District Judge a sum in all of Rs. 8,479-11-6 and undertook to pay or deposit into Court within two months the dividend amount in the scheme schedule

allotted to the creditors named therein and further "to pay into Court when ordered such sums as may hereafter be ordered by the Court to be paid to such creditors as may be ordered to be included in the schedule." The principal sum secured under the bond is exactly one-fourth, four annas in the rupee, of the sum total of the debts shown in the insolvency petition schedule. The total dividend which was due to the 16 creditors who had been already placed on the scheme schedule on 22nd December, 1925 at the rate of four annas in the rupee amounted to Rs. 3,741-1-2, so that the surety was making himself responsible beyond that sum for a further sum of about Rs. 4,700. It is clear therefore that the schedule approved by the Court provided for each creditor in the insolvency petition schedule being paid four annas in the rupee if his debt was proved to the satisfaction of the Court. Thus both the Court and the bond contemplated that creditors who had not yet come on the scheme schedule might be allowed to come on hereafter, that is, might be allowed to prove their debt for the purpose of being paid the approved dividend of four annas in the rupee.

Now it is contended for the respondent that inasmuch as the Court has now ordered the respondent's name to be put on the schedule it is not open to the appellant to contest that order since under the terms of his bond he has to pay whatever sums the Court may order up to the limit of Rs. 8,479. I do not accept this contention so broadly stated. It is obvious, for example, that the bond implies, though it does not state, that the limit of the surety's obligations was not so much the lump sum of Rs. 8,479 as the payment of a four-anna dividend to each of the creditors in the original insolvency petition schedule, and that if the Court had ordered him to pay to some creditor not on that schedule, the spirit if not the letter, of the bond would have been broken. In such a case it would be open in my opinion for the surety to plead that the action of the Court was contrary to the contract. It also appears to me implicit in the contract that the inclusion of other creditors in the scheme schedule by the Court shall be in accordance with law. It cannot be supposed that the parties contracted with the idea that one party or the other would not conform to the law. It appears to me therefore that it is open to the appellant to take up the position that the inclusion of this creditor in the scheme schedule and the consequent order of the Court that the appellant shall pay him a dividend are contrary to law and should be annulled. I therefore proceed to consider the legality of the Judge's order.

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The appellant contends that after the adjudication has been annulled the Court cannot allow proof of debt by a creditor. He would therefore limit the word "hereafter" in the bond to "before the date of annulment of adjudication." Now, is it a correct proposition of law that after the annulment of an adjudication no proof of debt can be allowed? The appellant argues generally that annulment of adjudication *ipso facto* puts an end to the insolvency. This proposition has to be examined. But before proceeding to do so I wish to enter a *caveat* against my ruling in *Alamelu Ammal* v. *Venkatarama Aiyar*[1] being regarded as laying down in broad terms that the annulment of an adjudication in all cases puts an end to insolvency proceedings within the meaning of section 28 of the Act V of 1920. I have already dealt with that matter in my judgment in C.R.P. No. 170 of 1926.

There are four sections in the Insolvency Act under which annulment of adjudication may be ordered: sections 35, 36, 39 and 43. An examination of these will show that in a case under section 36, the state of insolvency is obviously not put an end to, nor do the insolvency proceedings cease, since these continue in another Court. In cases under sections 35 and 39 the annulment is because the debts *have been paid* either in full or because creditors have accepted part payment in full satisfaction. In the case under section 43 the adjudication is annulled as a punishment because the debtor has not prosecuted his application for discharge. It is clear that in cases under sections 35 and 39 the state of insolvency ceases because the debts have been paid so far as the insolvent can ensure that result and in the case of section 43 it ceases because the debts have not been paid and the debtor is to blame for not assisting payment. Section 43 (2) also clearly implies that the debtor's protection has been taken away, that he is again put in the *status quo ante* the insolvency proceedings and he is again at the mercy of his creditors. Under section 43 therefore the annulment of adjudication is evidently intended to put an end to the insolvency proceedings as a whole. Sections 35 and 39 do not contain any provision similar to section 43 (2) and clearly the annulment of adjudication under those sections is not by way of punishment. Therefore when the adjudication is annulled because he has paid his debts so far as he can, it appears to me the intention of the Act is that he shall not be put again in *status quo ante*

1. (1927) I.L.R. 50 M. 977: 53 M.L.J. 422.

the insolvency at the mercy of his creditors, but that his creditors those of them at least who are willing to come in under the composition scheme shall be paid in the insolvency proceedings themselves, and that they shall not be left to collect their debts *de hors* the Insolvency Court.

This involves the corollary that under section 39 a composition binds all creditors in the insolvency petition schedule and I think it is clear that this is so. No doubt section 38 (2) does not have the word "all" between the words "accepted by" and "the creditors" but the meaning is clear. In the English Bankruptcy Acts of 1883 and 1914 and in the Presidency Towns Insolvency Act, section 30, it is perfectly clear on the wording that the composition is binding on all creditors mentioned in the insolvency petition schedule. I think it is therefore clear that a composition approved by the Court shall be deemed to be accepted by all such creditors; that is, the Insolvency Court by accepting the composition has provided for the payment of all such creditors in the insolvency proceedings themselves, and no such creditor can after the Court's approval of such a composition proceed independently against the insolvent. The appellant's main contention necessarily involves that when an adjudication has been annulled under section 39 the insolvent may be arrested at once by any creditor who is not already in the *scheme schedule*.

No Court can reasonably accept such a position, namely, that the approval by the Court of a composition by the insolvent immediately lays him open to arrest at a time when he has put all his property at the disposal of his creditors since it has all been handed over to the trustee under the composition, and when he is therefore unable to satisfy any debt and must go to jail. Under this theory, by accepting a composition a debtor practically closes the jail doors upon himself. This cannot be the insolvency law and the fallacy in the argument is that any creditor mentioned in the insolvency petition has, when a composition has been approved, any remedy *de hors* the insolvency. His remedy is to come in on foot of the composition which is deemed to be duly accepted by all such creditors and to prove his right to the approved dividend. For that purpose the insolvency proceedings must obviously continue and they do continue. The Court is still bound to see that the composition is carried out—see for example section 40—and may even annul it. The position therefore is that while

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the annulment under a composition puts an end to the insolvent's state of insolvency, it does not put an end to the insolvency proceedings and the insolvent is thus protected from arrest by any creditor who is not in the insolvency petition list by force of section 28 of the Act, which enacts that a creditor shall not have any remedy against the insolvent while the insolvency proceedings are pending without leave of the Court.

One case in the Lahore High Court, reported in *Ram Sarup* v. *Khalil-ul-Rahman*[2] and confirmed on appeal in *Khalil-ul-Rahman* v. *Ram Sarup*,[3] has been cited for the contention that all creditors are not bound by the composition. In that case the creditor had taken no notice of the insolvency proceedings at all and had refused to prove his debt therein. It was held that he was not bound by the composition and could have his remedy *de hors* the insolvency. If that case is an authority for the position that the approval by the Court of a composition *ipso facto* puts the insolvent at the mercy of any creditor who refused to come in, I must express disagreement with it for reasons already given.

No limit of time appears to have been fixed in the Act within which the creditor may come in and prove. The appellant argues that he must prove before the annulment of adjudication because the insolvency proceedings must be considered to have terminated then. That argument has been dealt with. The appellant argues further that as section 39 says the schedule has to be framed in accordance with the provisions of section 33, and as section 33 fixes the discharge as the terminus *ad quem* for tender of proof of debts, and as the annulment of adjudication in this case amounts to a discharge, therefore no proof can be tendered after the annulment. The fallacy here, I think, is in applying section 33 (3) to a case to which it was not intended to apply. There is here in my view no discharge. The date of application for a discharge is ordinarily fixed by the order of adjudication. If that order is annulled the necessity for applying for discharge must also be annulled. That this must be so appears from a consideration of section 43. One cannot hold that an insolvent whose adjudication had been annulled because he had not applied within the time fixed for discharge had still by force of the original order of adjudication to apply within the time fixed for his discharge. It is

2. (1925) 87 I.C. 348.   3. (1926) 95 I.C. 204.

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absurd to contend that in spite of the annulment he still has to apply for a discharge when that period has passed and he is being punished for not applying within it. Support for this view is also found in section 40, under which a re-adjudication may be made if the Court thinks fit. Such re-adjudication would be unnecessary if the insolvent had still to be discharged. A case reported in *Ex parte Clark, In re Clark*[4] has been cited in support of the contention that even after an annulment of adjudication by a composition there must be an order of discharge. That case was with reference to section 18 of the English Bankruptcy Act of 1883, which is much more comprehensive in its terms than ours. I do not think it necessary to discuss it here for it really does not assist the appellant. If an order of discharge is still required, then the creditor can under section 33 (3) still prove his debt. Even if *Ex parte Clark, In re Clark*[4] has to be so interpreted it seems hardly in conformity with *In re Keet,*[5] where Stirling, J., interprets an annulment of adjudication in the following way, that is to say, "wipes out the bankruptcy altogether and puts the bankrupt in the same position as if there had been no adjudication"—at p. 676. Even if the view of Page, J., in *Krishna Kishore Adhicary, In re*[6] be accepted, namely that "the acceptance of a scheme operates as a conditional discharge," it would make no difference here since the debt could be proved at any period before the final discharge. However in my view section 33 (3) for reasons I have given does not apply to the case of an annulment of an adjudication by force of a composition. The general principles of the insolvency law then apply to determine the limit of time within which the creditor may prove his debt. These are enumerated by Mellish, L.J., so long ago as 1872 in *In re General Rolling Stock Company*[7] as follows at p. 650:

"Everybody who had a subsisting claim at the time of the adjudication is entitled to participate in the assets"

and

"as long as assets remain unadministered, he is at liberty to come in and prove his claim, not disturbing any former dividend."

Reference may also be made to *Sivasubramania Pillai* v. *Theethiappa Pillai,*[8] a ruling of this Court, and the cases cited therein. There it was held that even after discharge in some cases debts may be proved.

4. (1884) 13 Q B D. 426.
5. (1905) 2 K B 666.
6. (1927) I.L.R. 54 C 650.
7. (1872) 7 Ch A. 646.
8. (1923) I.L.R. 47 M. 120 45 M.L.J. 166.

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I think therefore the correct view of the position is that although the annulment of adjudication puts an end to the insolvent's state of insolvency, it does not, in cases such as are contemplated by section 37 where the Court still retains control of the insolvent's assets, put an end to the insolvency proceedings within the meaning of section 28, that all creditors named in the insolvency petition schedule are bound by a composition which has been approved by the Court and must come in on foot of it and cannot have any remedy *de hors* the insolvency proceedings, and that any creditor is entitled, unless the Court thinks his application is unduly delayed, to prove his debt at any time before the final dividend has been paid, and will, when he proves his debt, be admitted on foot of the composition to have his name added to those already in the scheme schedule under section 29 and get his dividend at the scheme rate so far as there are still assets available for distribution. Reference may be made in this connection to the ruling in *Sivasubramania* v. *Theethiappa*[8] and to the general principles enunciated in a decision of this Court in *Govindas Chaturbhujadas* v. *Ramadoss*[9] on the analogous provisions in the Presidency Towns Insolvency Act (III of 1909).

Now in the present case as noted the creditor was in the insolvency petition schedule and his debt was taken into the reckoning of the amount for which the surety gave his bond. He was not given notice, as he ought to have been given notice of the proposed composition and therefore he did not come earlier to prove his debt. But he is willing to accept the composition rate, and he is, as I have shown reasons for holding, entitled to be paid at that rate and to recover from the surety according to the terms of his bond, since there is money still available for the purpose. I am therefore of opinion that the order of the learned District Judge is right and I would dismiss this appeal with costs.

Thiruvenkatachariar, J.

Thiruvenkatachariar, J.—This appeal is preferred against an order of the District Court of Bellary in an insolvency matter. In Insolvency Petition No. 9 of 1921 one Karugodu Seenappa was adjudged an insolvent. The time fixed for the insolvent's application for discharge was on his application extended from time to time till 2nd March, 1925. On that date the insolvent filed a petition under section 38 of the Provin-

8 (1923) I.L.R 47 M. 120: 45 M.L.J. 166.
9. (1924) I.L.R. 48 M. 521: 48 M.L.J. 252.

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cial Insolvency Act, 1920, submitting for the approval of the Court a proposal for a composition in satisfaction of his debts. The main terms of the proposal were: (1) the creditors of the insolvent should accept four annas in the rupee in full satisfaction of their debts and forego the balance; (2) the amounts payable to the creditors according to the said composition should be paid to them by Timmappa, son of Kamireddi Lingappa, within two months from the date of the approval by the Court of the proposal for composition; and upon such payment being made the property of the insolvent still undisposed of and the debts remaining uncollected by the Receiver should be handed over to the said Timmappa who shall be at liberty to make good the payments made by him by the sale of the properties and collection of debts so handed over to him by the Receiver. The insolvent stated in the said application that the proposed composition is beneficial to the general body of creditors, most of whom had signified their acceptance of the same and that the said Timmappa has with the help of the relations of the insolvent come forward to pay up the liabilities of the insolvent as proposed. Upon this petition notice was ordered to all the creditors and after several adjournments the Court on the 22nd October, 1925 passed the following order:

"No creditor has objected to the scheme which the Receiver reports is to the great advantage of the creditors in general I therefore approve of the scheme For framing schedule and for petitioner to issue notices by registered post to all creditors who have not yet proved to prove their debts on or before the 21st December, 1925. To 6th November, 1925 for security bond of the proposed surety"

The said Timmappa filed his security bond in Court on the 30th November, 1925 and it was approved by the District Judge on the 1st December, 1925. Under the said bond he bound himself to the District Judge of Bellary in the sum of Rs. 8,479-11-6, subject to the conditions stated therein. Those conditions are (1) that the said Timmappa should within two months pay the creditors their respective dividend amounts noted in the schedule of creditors who have proved their debts attached to the order accepting the composition, and (2) pay in Court when ordered such sums as may hereafter be ordered by the Court to be paid to such creditors as may be ordered to be included in the schedule.

On the 22nd December, 1925 the Court finally accepted the proposal and passed an order under section 39 embodying the terms of the proposal and annexing thereto a schedule of the creditors who had proved their debts and also annulling the order

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of adjudication of the insolvent. The schedule to the said order comprised only 16 creditors who had proved their debts out of the total number of 36 creditors mentioned in the insolvent's schedule. The 16 creditors were paid their dividend amounts aggregating to Rs. 3,381-11-7 and the properties of the insolvent were thereafter handed over to the surety Timmappa as provided in the order accepting the composition.

On 20th December, 1926 one Devasi Harpal, who is the 29th creditor in the insolvent's schedule, applied to the Court praying that he may be allowed to prove his debt and his name be included in the schedule of creditors attached to the order approving the composition. He stated that he had no notice of the proposal for composition and that he is prepared to accept a dividend for his decree debt under the composition. The learned District Judge being of opinion that this creditor had not been served with notice of the proposal for composition allowed him to prove his debt, but before passing final orders issued notice to the surety Timmappa to show cause why the application of this creditor should not be granted.

The surety Timmappa filed a counter in which he contended (1) that the only liability which he undertook under his security bond was to pay all the creditors who proved their debts before the annulment of adjudication of the insolvent, (2) that by the annulment of adjudication the insolvency proceedings came to a close and his security bond was fully discharged by his payment to all the creditors included in the schedule, the dividends payable to them, and (3) that the petitioning creditor not having been included in that schedule is not bound by the composition scheme and he may seek his remedy, if any, in the ordinary Courts of law.

The learned District Judge by his order, dated 19th August, 1927 overruled the surety's objections. He held that the surety under the terms of his bond bound himself not only to pay the dividends noted in the schedule attached to the order approving the composition, but also such sums as he may thereafter be ordered by the Court to pay to such creditors as he may be ordered to be included in the said schedule. He therefore ordered the inclusion of this creditor's name in the schedule and directed the surety to deposit within a month Rs. 542-1-3 being the amount of the dividend payable to him under the composition scheme. Against this order the surety Timmappa has preferred this appeal.

The main contentions urged on behalf of the appellant are:

(1) That the order passed under section 39 annulling the adjudication of the insolvent puts an end to his insolvency and the Court cannot thereafter allow any creditor to prove his debt as if the insolvency proceedings are still pending before it.

(2) That under the terms of the surety bond, the appellant undertook to pay only those creditors whose debts are proved and whose names are included in the schedule attached to the order made under section 39. He is not therefore liable to be called upon to pay the dividend to any creditor whose name is not then included in that schedule.

(3) Even if under the security bond he had undertaken to pay the dividend to the creditors not included in the said schedule but who may thereafter be allowed to prove their debts, such a condition will be inoperative in law, as the Court after annulling the adjudication under section 39 has no jurisdiction to amend the schedule of creditors attached to the order passed under section 39 and the surety can avail himself of that defence.

The questions we have to determine in this appeal are whether the above contentions of the appellant are to any and to what extent well founded.

First as regards the extent of the surety's obligations under his bond, I have no doubt that the view taken by the District Judge is correct. It is quite clear from a perusal of the terms of the proposal for a composition which was submitted by the insolvent for the approval of the Court on 2nd March, 1925 that the surety Timmappa was put forward as willing to pay all the creditors of the insolvent the dividends they would be entitled to under the composition. On the date of that petition only some of the creditors had proved their debts. The Court in its order approving the composition ordered a further notice to issue to the creditors who had not proved their debts in order that the names of such of them as prove their debts may be included in the schedule to be prepared under section 39. At the same time the Court, having regard evidently to the likelihood of some of the creditors not proving their debts within the time limited in the said order, wanted not to shut them out from the benefits of the composition on the ground merely that they had not proved their debts within the time fixed for the order to be passed under section 39. It was in view of that consideration that the maximum amount of the surety's liability was fixed in

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his bond at Rs. 8,479-11-6 which represents the dividends payable to all the creditors in the insolvent's schedule at four annas in the rupee, and the conditions of the bond were not only the surety should pay the dividends to the creditors mentioned in the schedule to the order passed under section 39 within two months' time from the date of that order, but that he should also pay into Court when ordered the dividends which are payable to any other creditor whose name may thereafter be included in the schedule. In the face of this explicit undertaking by the surety it is futile to contend that he undertook to pay the dividend only to those creditors who prove their debts before the order accepting the composition and annulling the adjudication is passed under section 39 and whose names are included in the schedule annexed to the said order.

It is however contended that even if the surety's contention on that point is wrong and it must be held that he had also undertaken to the Court to pay when ordered the dividends to other creditors of the insolvent who may prove their debts thereafter, that undertaking cannot be enforced because the Court has no jurisdiction to entertain proof of any debts after the insolvency is annulled, and the schedule of creditors prepared under section 39 cannot thereafter be amended. It is argued that the annulment of the adjudication of an insolvent under section 39 in consequence of the Court approving the composition has the same effect as his absolute discharge as by the annulment the debtor ceases to be an insolvent and is therefore in the same position as if he had been discharged.

It is further argued that under section 39 of the Provincial Insolvency Act the composition approved by the Court is binding only on the creditors entered in the schedule annexed to the order annulling the adjudication and that therefore it is open to a creditor not entered in the said schedule to seek his remedy against the debtor by independent proceedings. The question what exactly is the effect of an annulment of adjudication of an insolvent under section 39 of the Act turns upon the relevant provisions of the Act. Under section 39 the terms of the composition shall be embodied in an order of the Court and the Court shall frame a schedule in accordance with the provisions of section 33. The order of adjudication shall be annulled and the provisions of section 37 shall apply and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein. Section 37 is in these terms:

"Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or Receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may by order in writing declare."

Under the Act an annulment of adjudication may be made on various grounds. To all such cases the first part of the above section applies and all sales and dispositions of property which had been made prior to the annulment will stand good. The latter part of the section deals with the particular order which the Court may pass at the time of annulling the adjudication. The nature of that order will, of course, depend upon the ground on which the adjudication is annulled and on the circumstances of the particular case. When the annulment is ordered in consequence of the composition being accepted by the Court, it is empowered to pass such order as it may consider necessary for giving full effect to the composition approved by it. We have therefore to see what the conditions are which have been laid down by the Court in its order annulling the adjudication with regard to the vesting of the debtor's property in this case. In order to ascertain those conditions we have to look not only at the terms of the order annulling the adjudication which was passed on 20th December, 1925, but we have also to consider the terms of the proposal as set out in the insolvent's application put in under section 38 which were approved by the Court by its previous order, dated 22nd October, 1925, pursuant to which the surety bond with the conditions already referred to was accepted and the final order annulling the adjudication was passed on 20th December, 1925. A perusal of the said orders and the bond executed by the surety clearly shows that on the surety paying within two months the dividends payable to the creditors entered in the schedule prepared under section 39 all the properties of the insolvent which according to his schedule were worth Rs. 10,845 were to be handed over to the surety subject to the further obligation expressly undertaken by him in his bond to pay when ordered by the Court the dividends which may be payable to any other creditors who may thereafter be allowed to prove their debts and to be entered in the said schedule. The surety is empowered to reimburse himself the payments made by him on account of the insolvent by the sale of the insolvent's properties. It follows that if any residue is left after payment of dividends to all the cre-

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ditors as ordered by the Court such residue will revert to the debtor. In other words, the surety is in the position of a trustee to whom all the properties of the insolvent are assigned on his undertaking to be personally responsible for the payment of dividends to all the creditors of the insolvent as ordered by the Court up to the total amount mentioned in his bond, namely Rs. 8,479-11-6 and with liberty to recoup himself out of the insolvent's estate. Those are the conditions of the Court's order subject to which the annulment was made and which are binding on the surety to whom the insolvent's properties were handed over subject to the said conditions. The effect of the order is that though the annulment under section 39 has put an end to the status of the debtor as an insolvent, the Court has still control over the insolvency proceedings for the purpose of giving effect to the composition approved by it. For that purpose it is competent to the Court to enforce all the conditions laid down by it subject to which the annulment was made. That by an annulment under section 39 the Court does not cease to have jurisdiction over the insolvency proceedings is also clear from section 40 under which it is open to the Court to annul the composition or scheme and re-adjudge the debtor-insolvent but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme.

It is argued for the appellant that under section 39 the composition is binding only on the creditors whose names are entered in the schedule annexed to the order of annulment and that the other creditors have their ordinary remedies against him as he is no longer an insolvent and that therefore the composition is fully worked out when the schedule creditors are paid their dividends and thereupon the surety's obligation with reference to the composition also comes to an end. It is no doubt correct to say that no creditor can claim the benefit of the composition unless and until his name is entered in the schedule, but section 39 does not say that the schedule of creditors as it stood when the order of annulment was passed cannot be amended by the addition of the names of other creditors who may be allowed to prove their debt after that order is made.

Under section 33 (3) any creditor of the insolvent may at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of

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any debt provable under the act and not entered in the schedule and the Court after causing notice to be served on the insolvent and the other creditors who have proved their debts and hearing their objections, if any, shall comply with or reject the application. An order of annulment does not amount to a discharge of the insolvent which has the effect of wiping off all the debts of the insolvent provable in the insolvency. There is, therefore, no reason why a creditor who has not proved his debt when the order under section 39 was passed should not subsequently be allowed to prove his debt and to have his name entered in the schedule prepared under section 39 if he wants to have the benefit of the composition, it being of course open to the Court to accept or reject his application as it thinks fit. So long as the assets out of which the composition is to be paid are not exhausted, there is no reason why proof of further debts should not be allowed by the Court especially as the Court before approving the composition has to be satisfied that the composition is for the benefit of the general body of creditors and though accepted only by a majority in number and three-fourths in value of those creditors only have proved their debts, it shall be deemed to be duly accepted by the creditors, *i.e.*, by the entire body of creditors. The opposite view contended for on behalf of the appellant, namely, that the Court has no power to amend the schedule prepared under section 39 would lead to the result, *viz.*, that the creditors who have not proved their debts when that schedule is prepared either lose their rights altogether if they have no other remedy as a penalty so to speak for not proving their debts within time, or they are at liberty after the annulment to proceed against the debtor by suit or execution proceedings to enforce their claims against him, he being no longer an insolvent. In support of the latter view the case in *Khalil-ul-Rahman* v. *Ram Sarup*[3] decided by the learned Chief Justice and another learned Judge of the Lahore High Court is relied on. In that case the learned Judges held that when the adjudication of an insolvent is annulled under section 39

"a creditor who does not choose to take advantage of the composition and to prove his debts for participation in the funds made available under the composition is not bound to do so. He may take his chance and recover what proportion of his debt he can in due course of law. The binding force of a composition is due to the law which is embodied in section 39 and that law must be applied subject to all the restrictions set forth in the section. The composition cannot be held to be binding except

3. (1926) 95 I.C. 204.

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on creditors who caused their debts to be entered in the schedule contemplated by the section."

Assuming this decision to be correct with reference to the wording of section 39 it is no authority for the proposition that a creditor who desires to avail himself of the composition cannot apply to the Court to be permitted to prove his debt and to have his name entered in the schedule which is the case before us. The question whether a creditor who is not allowed to prove his debt after the order of annulment is made has any other and what remedy open to him does not arise in this case. We are therefore not called upon in the present case to say whether the interpretation of section 39 in *Khalil-ul-Rahman* v. *Ram Sarup*,[3] which confirmed in appeal a decision to the same effect, passed by a single Judge of the same High Court is correct or not. If the effect of section 39 is as stated in *Khalil-ul-Rahman* v. *Ram Sarup*,[3] then the annulment of the insolvency of the debtor results in giving a free hand to the creditors not included in the schedule prepared under that section who do not wish to accept the composition and they may at once proceed against him to enforce their debts. As all the properties possessed by the debtor at the date of the annulment are under the control of the Insolvency Court for payment of dividends due to the scheduled creditors, the other creditors will have in most cases nothing more than the future earnings of the debtor to look to for payment of their debts and any decree they may get can be enforced only against such earnings or any other after-acquired property of the debtor or by his arrest. The position of the insolvent is thus rendered even more precarious than it was when he was adjudged an insolvent and much more harassing if he is liable to be arrested for the debts which were provable in the insolvency notwithstanding that he has parted with all his properties for the benefit of his creditors. I therefore fully share the reluctance expressed by my learned brother during the course of the arguments that an interpretation of section 39 which leads to such a result should not be accepted as correct unless we are forced to it by the clear language of the section.

The question as to the right of an unscheduled creditor to enforce his debt by recourse to ordinary remedies against a debtor whose adjudication has been annulled under section 39 does not arise in this case, but I may observe that the view taken by the learned Judges of the Lahore High Court seems to be warranted

3. (1926) 95 I.C. 204.

by the difference between the wording of section 39 of the Provincial Insolvency Act (V of 1920) and the wording of the corresponding section, *viz.*, section 30 of the Presidency Towns Insolvency Act (III of 1909). Under section 39 of the Provincial Insolvency Act the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debt entered therein. But under section 30 of the Presidency Towns Insolvency Act the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable in insolvency. In all other respects the provisions of sections 38 and 39 of the Provincial Insolvency Act correspond to the provisions of sections 28, 29 and 30 of the Presidency Towns Insolvency Act. Under both the Acts notice of the proposal of the composition has to be given to all the creditors. If the proposal is accepted by a majority in number and three-fourths in value of all the creditors whose debts are proved the same shall be deemed to be duly accepted by the creditors, *i.e.*, all the creditors including those who had not proved their debts. The difference between the two Acts comes in only with regard to the statement as to the binding effect of the composition approved by the Court. Section 30 of the Presidency Towns Insolvency Act adopts the language of the corresponding section of the English Bankruptcy Act:

> "A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy"

It will thus be seen that so far as the effect of an annulment of adjudication in consequence of the Court approving the proposal of a composition is concerned the Legislature in section 39 of the Provincial Insolvency Act now in force merely re-enacted the old section 27 of the repealed Provincial Insolvency Act in preference to the wording of section 30 of the Presidency Towns Insolvency Act, 1909. Having regard to this difference in language between the two enactments relating to the same subject passed by the same legislature I am not prepared to say that *Khalil-ul-Rahman* v. *Ram Sarup*[3] was wrongly decided, but at the same time I cannot help observing that there does not seem to be any sufficient reason for the order of annulment passed in consequence of the Insolvency Court approving the composition having different results under the two Acts or why the provision in the Presidency Towns Insolvency Act on that question which seems to me the more appropriate one and which

3. (1926) 95 I.C. 204.

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follows the corresponding provision in the English Bankruptcy Act is less suitable to annulments of adjudications under S. 39 of the Provincial Insolvency Act.

For the reasons stated the contention of the appellant that the action of the Insolvency Court in this case in allowing the respondent to prove his debt and including his name in the schedule was *ultra vires* and that therefore the condition in his bond that he is liable when ordered by the Court to pay the dividends to the creditors who may thereafter be included in the schedule is unenforceable cannot be accepted as correct.

In the result this appeal fails and is dismissed with costs.

A.S.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

K. Shunmugasundara Mudaliar and others .. *Petitioners* (Respondents* 1 *to* 3 *in Appeal No.* 218 *of* 1925 *on the file of the High Court—Plffs.* 3 *to* 5)

v.

S. Ratnavelu Mudaliar and others .. *Respondents (Appellants* 1 *and* 3 *to* 5 *and 4th Respondent in* do.—*Defts.* 1, 6 *to* 8 *and* 4).

Shunmugasundara Mudaliar v. Ratnavelu Mudaliar.

Civil Procedure Code (V of 1908), *S* 110—*Suit for general account in respect of trusteeship—Valuation over Rs.* 10,000—*Eight charges alleged and tried by Trial Court—General account not taken but two charges found proved and rest not proved—Appeal by defendants to High Court—Valuation Rs.* 7,000—*Memorandum of objections by plaintiffs—Finding of High Court that plaintiffs not entitled to a general account—Appeal allowed and memorandum of objections dismissed—Application for leave to appeal by plaintiffs—Decree of High Court if really one decree or two separate decrees.*

In a suit for a general account in respect of the defendants' trusteeship of a temple, which was valued at more than Rs 10,000, eight specific charges of malversation were alleged and these charges formed the subject-matter of the trial Without taking a general account the Trial Court found that two of the eight charges were proved and the other six failed. The defendants filed an appeal to the High Court in respect of these two charges and the plaintiffs filed a memorandum of objections under O. 41, R. 22 of the Civil Procedure Code relating to the other six charges. The High Court held that the plaintiffs had no right to claim a general account, as accounts had already been furnished and the plaintiffs themselves had suppressed the accounts and thereby prevented any further account being taken, and consequently allowed the appeal which

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*C.M.P. No. 2776 of 1928. 11th December, 1928.

was valued at Rs. 7,000 and dismissed the memorandum of objections. The plaintiffs applied for leave to appeal to His Majesty in Council.

Held, that the decree of the High Court in the appeal and the memorandum of objections was really one decree dealing with one subject-matter only and did not consist of separate decrees or parts in respect of separate subject-matters so as to hold that one of it is an affirming decree and the other a reversing decree and, because the latter is below Rs 10,000 in value, no appeal would lie to the Privy Council, and that, as the subject-matter of the suit in the first Court and the value of the appeal to the Privy Council was over Rs 10,000, the plaintiffs had a right of appeal to the Privy Council

Ramanathan Chetti v. *Subramanian Chetti*, (1926) 51 M.L J. 295 distinguished.

Read Petition presented under sections 109 and 110 and Order 45, Rules 2, 3, 6 and 8 of the Civil Procedure Code praying for the grant of a certificate to enable the petitioners herein to appeal to His Majesty in Council against the decree of this Court in A.S. No. 218 of 1925 preferred against the decree of the Court of the Subordinate Judge of Chingleput in O.S. No. 5 of 1922.

N. S. Srinivasa Aiyar for petitioners.

T. M. Krishnaswami Aiyar for *M. S. Venkatarama Aiyar* for respondents 1 to 4.

5th respondent unrepresented.

The Court made the following

ORDER. *Phillips, J.*—The petitioners brought a suit against the respondents asking for an account in respect of their trusteeship of the plaint temple. Although they asked for a general account in the plaint, eight specific charges of malversation were alleged and these charges formed the subject-matter of the trial in the first Court. Without taking a general account, the Subordinate Judge examined the evidence relating to the eight charges and held that two charges were proved and that the other six failed. The judgment is not altogether satisfactory, for it is quite possible that, if a general account had been taken some sums of money might have been found to be due to the respondents which could have been set off against the two claims allowed. The respondents filed an appeal in respect of these two claims and the appeal was allowed in this Court The petitioners filed a memorandum of cross-objections relating to the other six items and that was dismissed *in toto*. The ground for dismissing the claim of the petitioners *in toto* both in appeal and in the memorandum of objections was that the petitioners had no right to claim a general account as accounts had already been furnished and the petitioners themselves had suppressed the accounts and thereby prevented any

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Phillips, J.

further account being taken. The petitioners now wish to appeal to the Privy Council in respect of the whole of the subject-matter of the original suit.

It is contended for the respondents that the decree of this Court which was drawn up in respect of both of the appeal and of the memorandum of objections is in effect an affirming decree and that no substantial question of law arises. So far as the appeal is concerned, the decree of this Court can in no circumstance be deemed to be an affirming decree for it disallowed a sum of Rs. 7,000 which had been allowed by the Trial Judge. The contention for the respondents is that the appeal and the memorandum of objections must be treated as separate appeals and that so far as the decree in respect of the memorandum of objections is concerned, no appeal would lie to the Privy Council as the judgment of the Lower Court was affirmed and that, so far as the decree in the appeal itself is concerned, the value of the subject-matter is less than Rs. 10,000 and therefore no appeal would lie. The petitioners contend that the memorandum of objections must be deemed to be so intimately connected with the appeal itself as to constitute one appeal and that therefore the total value of the subject-matter is over Rs. 10,000 and the decree of this Court is a reversing decree. I am not prepared to hold that in all cases the memorandum of objections must be deemed to be dependent upon the appeal itself. The alteration in law effected by Order 41, Rule 22 (4) clearly indicates that the memorandum of objections may in certain cases be treated as a separate cross-appeal. The decision in *Alagappa Chettiar* v. *Chockalingam Chettiar*[1] does not affect the point, for that only dealt with the question of limitation. The further decision in *Murugappa Chettiar* v. *Ponnuswami Pillai*[2] which purported to follow *Alagappa Chettiar* v. *Chockalingam Chettiar*[1] does not apply here; but, with all respect, it seems to me difficult to hold that the abatement of an appeal on the death of the appellant and its subsequent dismissal does not amount to a dismissal for default of prosecution within the meaning of Rule 22, clause (4). What has to be considered in a question of this sort is whether the appeal and the memorandum of objections must be treated as forming two independent proceedings relating to distinct sets of facts, and it is now contended for the respondents that each of the eight charges of malversation formed a separate subject-matter and that inasmuch as this Court affirmed the decree of the Lower Court in

1. (1918) I.L.R. 41 M. 904: 35 M.L.J. 236 (F.B.).
2. (1921) I.L.R. 44 M. 828: 41 M.L.J. 304.

respect of six charges, it must be deemed to be an affirming decree and that therefore in respect of these six charges no appeal would lie to the Privy Council. It is, however, difficult to say that all these eight charges are separate and distinct subject-matters, for they were all based on the alleged breach of trust by the respondents, and in fact the six charges were dismissed by the Trial Court not on the ground taken by this Court, namely, that the petitioners had no right to demand an account, but on the merits of the evidence which was held not to prove the charges. In these circumstances, the case in *Ramanathan Chetti* v. *Subramanian Chetti*[3] decided by this Bench can be distinguished, for, there the memorandum of cross-objections related to a matter entirely distinct from the subject-matter of the appeal, nor do I think that the cases in *Raja Sree Nath Roy Bahadur* v. *The Secretary of State for India in Council*[4] and *Narendra Lal Das Choudhury* v. *Gopendra Lal Das Chowdhury*[5] apply. It is unnecessary to refer to the other cases cited, for, the question that has to be decided is, whether the decree of this Court in the appeal and memorandum of objections really consists of two separate decrees in respect of separate subject-matters, or whether it is really one decree dealing with one subject-matter only. In the former case, it may well be that in respect either of appeal or of the memorandum of objections, no appeal would lie to the Privy Council, whereas, in the latter case, if the subject-matter of the suit in the first Court and the value of the appeal to the Privy Council is over Rs. 10,000 an appeal would lie to the Privy Council. Here, so far as the value of the subject-matter of the suit and the appeal is concerned, the provisions of section 110, Civil Procedure Code, are complied with and it is not possible to split the decree into two parts and hold that one part is an affirming decree and that the other part is a reversing decree, and that because the latter is below Rs. 10,000 in value, no appeal would lie. In these circumstances, I would hold that the petitioners have a right to appeal.

It is perhaps unfortunate that in this particular case, this litigation which is undoubtedly prejudicial to the interests of the suit temple should have been instigated by a factious feeling prevailing between two parties. This, however, cannot affect the right of appeal of the parties. The petitioners have been prejudiced by the judgment of this Court and therefore they must be allowed to appeal to the Privy Council.

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3. (1926) 51 M.L.J. 295.
4. (1904) 8 C.W.N. 294.
5. (1927) 45 C.L.J. 426.

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Odgers, J.

I certify that the provisions of sections 109 and 110 of the Civil Procedure Code have been complied with in this case and grant leave to the petitioners to appeal.

Odgers, J.—This is an application for leave to appeal to the Privy Council from a judgment of Phillips, J., and myself. The suit was brought by certain persons interested in the temple of Sri Karaneeswaraswami, Saidapet, against the defendants for a general account of their management of the shrine and that defendants 1 to 4 be directed to pay Rs. 14,458 or such other sum as may be found due on such account being taken. The learned Judge decided the case on the eight points of particulars of claim lodged with the plaint and decided as to points A and B the 1st defendant was liable to account but that as to the other items he was not liable. It was held by us that the 1st defendant could not be held liable to a general account and accordingly he was not even liable on the two items found by the Subordinate Judge. Now the first question is, is this a decree of affirmance. The Subordinate Judge as stated did not find on the broad question of liability to general account at all which was the main ground for our decision here.

As regards the particulars there is no doubt that it was not a decree of affirmance and I think therefore that it cannot be said that our decree was in affirmance of the decree of the Lower Court.

Then the question is whether the appeal is worth Rs. 10,000. The total amount claimed is Rs. 14,500. I think there is no doubt that this is the amount in question on appeal to the Privy Council. The question is complicated by a memorandum of objections in which the respondents took objection to the finding of the Subordinate Judge with regard to the six other particulars of claim.

It is contended that all the eight items of particulars are independent and that therefore the value of the subject-matter must be under Rs. 10,000. I do not think that these items can be considered as being separate. They are really particulars of the claim for a general account, *i.e.*, they are incidents of the alleged misuse of trust moneys so that they really all depend on a finding as to whether the 1st defendant was liable to a general account or not. I therefore agree with my learned brother that they are not independent items.

The question is further as to whether the Court's order below as to the six items can be separated from the appeal as to the two allowed by the Subordinate Judge. Of course if the

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memorandum of objections relates to an entirely different matter as in *Ramanathan Chetti* v. *Subramanian Chetti*[5] it may be that the memorandum of objections must be considered as a separate cross-appeal quite distinct from the main appeal. In any case, the petitioner is to have the benefit of any doubt that may arise (*Vikrama Deo Garu* v. *Maharaja of Jeypore*[6]) though there is no doubt that, if an appeal is dismissed as being out of time, the memorandum of objections cannot be heard as it is dependent to that extent on the appeal. *Alagappa Chettiar* v. *Chockalingam Chettiar*.[1] But as I have held that all these items are not independent items but really hang together and are collectively dependent on and from particulars of the claim for a general account I think this objection must be overruled. I therefore agree that this is a fit case for appeal to the Privy Council and that the certificate may issue.

N.S. *Leave to appeal to Privy Council granted.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, MR. JUSTICE ODGERS AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

The Madras Central Urban Bank, Ltd., Mylapore .. *Assessee.*

F. B.

The Commissioner of Income-tax, Madras v. The Madras Central Urban Bank, Ltd., Mylapore.

Indian Income-tax Act (XI of 1922), Ss. 8 *and* 10 (1)—*"Income" and "Profits"—Distinction—Co-operative Societies Act (II of 1912)—Urban Bank registered as a society—Bank empowered to carry on general business of banking—Government order to keep* 40 *per cent. of liability in liquid form—Investment in Government securities—Interest earned from such investment—"Income" or "profits"—Liability to income-tax—Government Notification exempting profits of Co-operative Society from income-tax.*

One of the bye-laws of an Urban Bank which was registered as a society under the Co-operative Societies Act of 1912 empowered the Bank to carry on general business of banking not repugnant to the provisions of the Co-operative Societies Act. There was a Government order to the Bank to keep 40 per cent. of its total liability under call deposits in a liquid or fluid form. The Bank kept this amount in Government securities and received interest from these securities. This interest was sought to be taxed by the Income-tax authorities on the ground that it fell under S. 8 of the Income-tax Act. The Bank contended that this investment was part

*O.P. No. 202 of 1928. 21st December, 1928

1 (1918) I.L.R. 41 M. 904: 35 M.L.J. 236 (F.B.).

5. (1926) 51 M.L.J. 295. 6. (1916) M.W.N. 122.

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of its trade or business and the interest earned was its "profits" or "gains" within the meaning of section 10 (1) of the Income-tax Act and that, consequently, it was not taxable by virtue of the Government Notification issued under S. 60 of the Income-tax Act which exempts the "profits" of any Co-operative Society from the tax payable under the Act.

Held, that the obligation on the Bank to keep 40 per cent. of its total liability in a fluid form was in consequence of an administrative order of Government and did not oblige them, although it might permit them, to invest the fund, that, as the Bank was to hold the fund in readiness to meet a particular specified liability, it could not be said to be part of its business as a Bank to invest these liquid assets in the interval, and that, therefore, the interest earned by this investment was not "profits" liable to exemption from income-tax.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

I have the honour to state the following case for the decision of the Hon'ble the Judges of the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922).

2. The petitioner, The Madras Central Urban Bank, Ltd., hereinafter called the "Society" is a Society incorporated under the Co-operative Societies Act, 1912 (II of 1912).

The objects for which the Society was formed are as follows:—

(*a*) To collect funds for financing Co-operative Societies.

(*b*) To serve as the Provincial Apex Bank for the province of Madras, and

(*c*) To carry on general business of banking not repugnant to the provisions of the Co-operative Societies Act and the rules framed thereunder for the time being in force.

3. For the assessment of the year 1927-28 the Income-tax Officer, Second Circle, Madras, called on the Society under section 22 (2) of the Income-tax Act to make a return of its income. The Society returned an income of Rs. 22,278 under the head "Interest on mortgages, loans, etc.," and stated that the income derived by it from securities already taxed and declared to be income-tax free had not been shown in the return as it was not liable to income-tax. The Income-tax Officer pointed out that the income so derived by them was liable to super-tax and called on the Society to furnish those particulars. The Society returned an income of Rs. 1,33,110 from tax-free securities, Rs. 13,442 from interest on securities taxed at source and Rs. 35,000 income derived from investments in the Bengal Provincial Bank and claimed to deduct therefrom the expenditure incurred by it in earning that income, *viz.*, the interest paid on moneys

borrowed by it and utilised for the purchase of securities and investments computed at an average rate of Rs. 4.62 per cent. per annum. The Income-tax Officer allowed the claim and computed its total and taxable income as under—

	Rs.
Securities—	
Taxed	4,574
Tax-free	70,686
Other sources—	
Investments	22,278
Total income ..	97,538
Deduct income from tax-free securities and securities taxed at source ..	75,260
Taxable income ..	22,278

He levied income-tax and super-tax on this basis.

4. The Society appealed to the Assistant Commissioner and contested its liability to be assessed under the Act on the ground that by a notification issued by the Governor-General in Council under the powers vested in him by section 60 of the Income-tax Act (a copy of which is appended marked Exhibit A) the profits derived by it were exempt from the tax payable under the Income-tax Act. The Assistant Commissioner dismissed the appeal holding that the income derived by the Society from investments and interest on securities did not fall within the exemption.

5. The Society now requires me to state a case and refer for the decision of the High Court the following question:

"Whether the Madras Central Urban Bank is liable to pay income-tax and super-tax in respect of the interest on securities and investments?"

So far as the claim relates to the sum of Rs. 22,278 being interest on a deposit I am prepared to concede that this is a part of the profits of the Society assessable under section 10 of the Income-tax Act and is covered by the notification. I have accordingly eliminated this item from the assessment. As regards the interest on securities, however I am of opinion that such income is taxable under section 8 which enacts:

"The tax shall be payable by an assessee under the head 'interest on securities' in respect of the interest receivable by him on any security of the Government of India or of a Local Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company."

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The Society claims exemption of the interest on the strength of the notification referred to above. The notification exempts the "profits" of any Co-operative Society from the tax payable under the Income-tax Act, and unless the interest can be brought within the express terms of that notification it is not entitled to the exemption sought for. On an examination of the language employed in the Income-tax Act it seems to me that the words "income" and "profits and gains" have been used in the Act to denote distinct subject-matters of taxation; for example, the word "income" is used with reference to "salaries," "interest on securities" and "property" and the words "profits and gains" with reference to "business" and "profession." The term "profits" used in the notification is never applied to "interest on securities" which is consistently termed "income" and in my opinion an exemption in respect of "profits" cannot apply to that which the Act does not term "profits."

The history of the notification also makes this position clear. The first notification exempting the profits of Co-operative Societies is that of the Government of India No. 6216-S.R., dated 30th September, 1904, re-published on page 1106 of Part I of the *Fort St. George Gasette,* dated 18th October, 1904, which declared that

"the profits of any Co-operative Society for the time being registered under the Co-operative Societies Act, 1904 (X of 1904) or of dividends or other payments received by the member of any such society on account of profits are exempt from income-tax"

After the passing of the Co-operative Societies Act (II of 1912) a similar exemption was granted by the Governor-General in Council in the Notification of Government of India No. 681-F, dated 28th December, 1912, re-published on page 49 of Part I of the *Fort St. George Gasette,* dated 14th January, 1913. These notifications were issued at a time when the Income-tax Act (II of 1886) was in force. Interest on securities was then a distinct subject of taxation and was assessed under the second schedule to that Act—Part III. At that time doubts were expressed as to whether the notification exempted from income-tax the interest on securities held by Co-operative Credit Societies and the Government of India explained their intention and stated that the exemption applied only to the profits and gains made by such societies and that income-tax should be levied under Part III of the second schedule of the Income-tax Act, 1886, on the interest of all securities held by them. A copy of the Government of India's letter on the subject is appended (Ex. B). Subsequent

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practice has consistently followed the instructions therein issued. The present notification is merely a reproduction of the old and in the absence of any indication to the contrary, should, it appears to me, be construed in the light of its origin as explained above.

I am accordingly of opinion that the interest on all securities held by the petitioner Society is liable to income-tax and super-tax.

M. Patanjali Sastri for The Commissioner of Income-tax.

M. Subbaroya Aiyar for Assessee.

The judgment of the Court was delivered by

Odgers, J.

Odgers, J.—This is a case stated for our opinion by the Commissioner of Income-tax at the request of the Madras Central Urban Bank, Limited. This is a Society registered under Act II of 1912 and the question arises from its assessment on interest derived by it from investments in Government securities. The Society contends that it is exempted from paying tax in respect of these investments by a notification in the Finance Department issued under section 60 of the Indian Income-tax Act, 1922, which corresponds to section 28 of the Co-operative Societies Act enabling the Governor-General in Council to remit income-tax payable in respect of the profits of the society. The question is whether this interest is part of the profits of the society. The notification Ex. A exempts

"the profits of any Co-operative Society . . . registered under the Co-operative Societies Act, 1912 (II of 1912) or the dividends or other payments received by the members of any such society on account of profits."

The notification has been interpreted to include interest on securities which according to the Commissioner is consistently termed "income." "Profits" according to him does not include interest on securities and hence the latter is taxable. The contention for the Bank is that it is bound by the Government orders to keep 40 per cent. of its total liability under call deposits in a liquid or fluid form and that, instead of keeping these fluid assets in their safe or till, they keep them in as nearly a fluid form as possible in Government securities upon which of course they receive interest. It is said that this is part of the business of the Bank and that unless this interest were received the activities of the Bank would be very severely handicapped. That of course is a matter for detailed examination of accounts and balance sheets and so on of which nothing has been attempted before us. But what we have to decide is as to whether this investment in Government securities is part of the business of the Bank, or whether such investment falls under section 8 of the Act which says:

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"The tax shall be payable by an assessee under the head 'Interest on securities' in respect of the interest receivable by him on any security of the Government of India or of a Local Government,"

whereas the Bank contends that it should be assessed under section 10 (1):

"The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him."

If the Bank is assessed under that head no tax will be payable. Mr. M. Subbaroya Aiyar for the Bank has referred us to several English cases. Before referring to them, however, it may be as well to note that the English Income-tax Act, 1918, is a good deal more complicated than the Indian Act and that the English Statute is divided under schedules with rules under each schedule. For instance, schedule (*c*) concerns tax charged in respect of profits arising from interest, annuities, dividends and shares of annuities payable out of public revenue; schedule (*d*) tax charged in respect of profits or gains to any person residing in the United Kingdom (1) from any kind of property whatsoever, (2) from any trade or profession, etc.; so that, really the only question that arises on this reference is, whether the investment is part of the Bank's trade or not; in other words, whether it falls under S. 1 (3) of their bye-laws "to carry on general business of banking not repugnant to the provisions of the Co-operative Societies Act." Turning to the Indian Act, it will be observed that this complication of schedules is absent, but that section 6, which is the first section in Chap. III headed "Taxable income" divides the heads of income which are chargeable to income-tax into (1) salaries, (2) interest on securities, (3) property, (4) business, (5) professional earnings, and (6) other sources. To refer to the cases cited by Mr. M. Subbaroya Aiyar: *Smiles* v. *Australasian Mortgage and Agency Company, Limited*,[1] a company in the course of wool-broking business granted temporary advances on the security of second mortgages or on wool and produce. The Court of Exchequer, Scotland, held that interest was chargeable under the first case of schedule (*d*), *i.e.*, trade, manufacture, etc. The Lord President pointed out that the account between the company and its customers was of the nature of a current account as between bankers and customers and held that this was proper trading and nothing else and not investment of money upon securities. Lord Shand said:

1. (1888) 2 Tax Cases 367.

"If a company which has a large rest fund laid aside for the purpose of investment makes investments in foreign stock or other foreign securities, that is a case in which the charge is to be made under the fourth case."

But the President was of opinion that the present case was entirely different because the company was doing the business of wool-brokers. Lord Shand also thought:

"It is quite unlike a case of investment, the interest fluctuates; it is for no fixed period; the transaction may be closed at any time. In short, it is the case of a wool-broker combining with his business that of a banker."

But as Lord Shand further points out:

"If this had been the case of a banking company carrying on the business of a Bank that would not be a case falling within the fourth case, which is the case applying to investments."

Scottish Investment Trust Company v. *Forbes*[2] is also a decision of the Court of Exchequer, Scotland. That was a case of an investment company and therefore investment was an essential feature of the business and therefore the net gain made by the company by realising investments at higher prices than were paid for by them were to be reckoned among the profits and gains for the purpose of assessment. *Norwich Union Fire Insurance Company* v. *Magee*.[3] That was an Insurance Company receiving as part of their profits interest on American securities not remitted to the United Kingdom. *Held,* that the interest formed part of the profits of the company being assessable under case (1) of schedule (*d*). So in *Liverpool and London and Globe Insurance Company* v. *Bennett*[4] the Liverpool and London and Globe Insurance Company carried on business at home and abroad. By the laws of certain of the foreign countries in which it conducted its business, the company was required to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. This was done. They also voluntarily invested certain other sums. Both classes of investments yielded interest which was received abroad and not remitted to the United Kingdom. It was held that the interest on both classes of investments was assessable under the first case of schedule (*d*) as being part of the business. Hamilton, J., held that the voluntary investments were not for the sake of investments but for the sake of having a fund abroad readily realisable to meet the liabilities of their business and that the making of the investments was just as much part of their mode of conducting the business as the taking of risks and in the event of the

2. (1893) 3 Tax Cases 231. 3. (1896) 3 Tax Cases 457.
4. (1911) 2 K.B. 577.

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current account at the Bank being insufficient to meet the liabilities, all the investment funds might have to be called upon at some time or other. The object of the investments was to extend the business, so the making of them was part of the business. These extracts from the judgment of Hamilton, J., seem to me sufficient to at once distinguish this from the case before us. In *Liverpool and London and Globe Insurance Company* v. *Bennett*[5] this very case went to the House of Lords after having been affirmed by the Court of Appeal in *Liverpool and London and Globe Insurance Company* v. *Bennett.*[6] Their Lordships dismissed the appeal holding that the income of the foreign investments formed part of the profits or gains of the company's business and was properly taxed under case (1) of schedule (*d*). *See* Lord Loreburn at page 619 who adopts Buckley, L J.'s expression that the investments were "the fruit derived from a fund employed and risked" in a business coming within the statutory description. It has also to be noticed that *Liverpool and London and Globe Insurance Company* v. *Bennett*[5] was not a case of Government securities. It seems to me impossible at least without a great deal more information than has been presented to us to say that these investments of more or less amounts for a longer or shorter time on the part of the Bank in order to prevent their fluid assets from lying absolutely idle in their coffers formed part of the business of the Bank. It seems to me that they are in the same position as any private person who with a large credit balance in his private account desires to put it into a remunerative form which shall at the same time be readily realisable and therefore invests for shorter or longer periods in Government paper. Mr. Patanjali Sastri for the Crown cited *Back* v. *Daniels*,[7] where the Court of Appeal held that under the peculiar circumstances of that case Daniels were occupiers of some sort of the land in question which prevented them being assessed under schedule (*d*) but the importance of the case is in the expression of the opinion of Scrutton, L.J., at page 544 that

"when there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, I can understand a separate assessment of that operation; but I do not think that the fact that the farmer sells his produce either on the farm or at the local market, or at Mark Lane, or even if he sells it in a shop, justifies an assessment under schedule (*d*) as well as or in substitution for schedule (*b*)."

5. (1913) A.C. 610. 6 (1912) 2 K.B. 41.
7. (1925) 1 K.B. 526.

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It therefore seems to me from the best consideration that I can give to the matter that this investment of these fluid assets of the bank cannot be held to be part of the business of the bank in accordance with the decisions quoted from the Scotch and English cases which seem to me to be all distinguishable and to be clearly assignable to an operation in furtherance of the particular business of the firm or company concerned. The obligation on the bank to keep 40 per cent. of its total liabilities in a fluid form is in consequence of an administrative order of Government and does not oblige them, although it may permit them, to invest the fund at all and it seems to me that as they are to hold the fund in readiness to meet some particular liability which is specified, it cannot be said to be part of their business as a Bank to invest these liquid assets in the interval. I think therefore the decision of the Commissioner was right.

We think the Bank must pay Rs. 250 for the Commissioner's costs.

N.S. *Commissioner's decision affirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE THIRUVENKATACHARIAR.

Donepudi Subramanyam .. *Appellant** (*1st Respondent in S.A. No.* 938 *of* 1923 *on the file of the High Court —Plaintiff*)

v.

Nune Narasimham and others .. *Respondents* (*Appellant and Respondents* 2 *to* 4—*Defendants* 1 *to* 4).

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Provincial Insolvency Act (*III of* 1907), *S.* 16 (2) (*b*)—*Scope of—Civil Procedure Code, O* 21, *R.* 63—*Suit by attaching decree-holder to contest the order allowing claim—Nature of—Insolvency of judgment-debtor subsequent to attachment but before the filing of the suit—Leave of Insolvency Court, if necessary—Leave not obtained—Decree passed in the suit, whether nullity—Decree, if can be challenged in a subsequent proceeding—Value of the appeal against the dismissal of the suit by the attaching decree-holder—Value of the property and not of the decree—Objection to valuation not raised in that Court—If can be raised in appeal from that Court or in a collateral proceeding—Suits Valuation Act, S.* 11.

Leave of the Insolvency Court under section 16 (2) (*b*) of the Provincial Insolvency Act of 1907 is not necessary for the commencement of a suit under O. 21, R. 63 of the Civil Procedure Code brought by the attaching creditor to contest the order passed in favour of a claimant allowing his claim to

*L.P. Appeal No. 112 of 1926. 14th November, 1928.

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the properties attached by the creditor, even though the judgment-debtor was adjudicated an insolvent subsequent to the attachment but before the filing of the suit.

Marappa Pillai v. *Raman Chettiar*, (1918) I.L.R 42 Mad 322 distinguished.

Vasudeva Kamath v. *Lakshminarayana Rao*, (1918) I.L.R. 42 Mad. 684: 36 M.L.J. 453 explained and distinguished

Section 16 (2) (*b*) of the Provincial Insolvency Act of 1907 prohibits, without leave of the Court, a creditor from commencing any suit or other legal proceeding which would by its nature hamper or affect prejudicially the administration of the insolvent's estate by the Insolvency Court in the insolvency proceedings. Unless the suit or other legal proceeding thus interferes with the insolvency proceedings, there is no reason why the Insolvency Court should have control over its institution

Nature of the suit by an attaching creditor under O. 21, R. 63 of the Civil Procedure Code considered.

Obiter: The fact that leave of the Insolvency Court was not obtained for the institution of a suit under section 16 (2) (*b*) of the Provincial Insolvency Act of 1907 does not render the decree passed therein a nullity and consequently the decree cannot be challenged in a subsequent suit on the ground of want of leave.

Per Wallace, J.—The value of the appeal filed against the dismissal of a suit under O. 21, R. 63 of the Civil Procedure Code by an attaching creditor whose attachment was raised by an order of the Executing Court allowing a claim is the value not of the decree of the attaching creditor but of the property sought to be recovered to satisfy the debt. Where no objection was taken to the valuation of the appeal before that appellate Court, such objection cannot be taken in second appeal from that appeal under S. 11 of the Suits Valuation Act and *a fortiori* cannot be taken in a collateral proceeding.

The institution of a suit by the attaching creditor under O. 21, R 63 of the Civil Procedure Code is not merely a continuation of the original claim proceedings but is really in part a new legal proceeding.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Phillips, dated the 5th January, 1926 and passed in Second Appeal No. 938 of 1923 preferred against the decree of the Court of the Subordinate Judge of Bezwada in Appeal No. 176 of 1921 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 111 of 1920.

B. Somayya for appellant.

T. M. Krishnaswami Aiyar and *B. C. Seshachala Aiyar* for respondents.

The Court delivered the following

Wallace, J.

JUDGMENTS. *Wallace, J.*—This Letters Patent Appeal is against the judgment of Phillips, J., in Second Appeal dismissing the plaintiff's suit.

The 1st defendant held a decree against defendants 2 to 4. In execution of that decree he applied for attachment of certain properties. The attachment was ordered on 22nd June, 1915 and was effected on 25th June, 1915. Between these

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dates on 24th June, 1915 an insolvency petition was presented by defendants 2 and 3. An adjudication followed on 16th December, 1915. Plaintiff, alleging a sale of these properties to him by defendants 2 to 4 on 11th March, 1915, had filed a claim petition against the attachment on 28th July, 1915. That was allowed on 8th November, 1915. On 31st March, 1916 1st defendant sued to set aside the order on the claim petition making the plaintiff and the insolvents parties but not joining the Official Receiver. His suit failed in the Trial Court, but he succeeded in the District Court on appeal, and a Second Appeal to the High Court was dismissed. The plaintiff then in 1920 brought the present suit to declare the decree of the District Court void because incompetent. His grounds are two: first, that the valuation of the 1st defendant's suit was beyond the jurisdiction of the District Court in appeal, and secondly, that the 1st defendant's suit was within the mischief of section 16 (2) (*b*) of the Provincial Insolvency Act (III of 1907) which was then in force and that since leave of the Insolvency Court had not been obtained neither the District Munsif's Court nor the District Court had jurisdiction to entertain the suit. Plaintiff lost in the Original Court, won in the Appellate Court, lost again before Phillips, J., and now appeals.

The first ground of attack on 1st defendant's suit seems to me without substance. No doubt in that suit the value of the decree which 1st defendant was seeking to execute against the property declared to be the plaintiff's was over Rs. 5,000, but the value of the property itself was said to be Rs. 4,000. The valuation of the appeal was clearly the value not of the decree but of the property sought to be recovered to satisfy the debt. The District Court therefore had jurisdiction. In any case it is clearly a matter which cannot now be urged in a collateral proceeding. No objection was taken before the District Court at the time of hearing of the appeal. Therefore under section 11 of the Suits Valuation Act, the objection could not be taken in appeal from the District Court. *A fortiori*, it cannot be taken in a collateral proceeding.

The second point is one on which reliance has been placed by the appellant. It depends on the interpretation of section 16 (2) (*b*) of the Provincial Insolvency Act (III of 1907), the terms of which, so far as is relevant to this case, are that

"on the making of an order of adjudication, . . no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property . . . . of the insolvent in respect of the debt or com-

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mence any suit or other legal proceeding, except with the leave of the Court. . . ."

The question is whether this prohibition covers the 1st defendant's suit to set aside the order on the claim petition. The suit was admittedly filed after the adjudication and without leave of the Insolvency Court. The insolvency proceedings are still pending.

Clearly the language of the prohibition is not intended to have such a wide meaning as it might imply. "Shall not commence any suit or other legal proceeding" cannot mean that every creditor of an insolvent after adjudication cannot file a suit or take legal proceedings against any one at all. What then is the nature of the restriction which this section seeks to impose? Clearly at all events the suit or legal proceedings must have some relation to the insolvency. The language used is the same as in, and has been taken from, section 9 of the English Bankruptcy Act of 1883, but there is a dearth of authority as to the meaning of it. The only useful cases from English Courts brought to our notice are three. In *In re Wray*[1] North, J., held that this prohibition under section 9 does not stand in the way of proceedings being taken against an insolvent under the Debtors Act. This was followed *In re W. A. Edye*[2] and in *Fasey, In re Trustees*,[3] in which latter case Kekewich, J., whose judgment was upheld in appeal, interpreted the phrase in section 9 "in respect of any debt" as meaning "in the sense of being intended to enforce payment of that debt." That, if I may say so with respect, gives a commonsense interpretation to the section; that is, the prohibition is against a creditor enforcing against his debtor *de hors* the insolvency proceedings a payment of his debt after his debtor has been adjudged insolvent, unless and until he has obtained leave of the Insolvency Court. The object clearly is to prevent an insolvent being harassed by extraneous proceedings elsewhere, when his liabilities, *vis a vis* his creditors, are the subject of proceedings in the Insolvency Court, since all efforts by creditors after an adjudication to obtain payment of their debts should be taken in the Insolvency Court and should be under the control of, and be dealt with by, that Court. It may be noted that while section 28 of the new Provincial Insolvency Act (V of 1920) corresponds to section 16 of the old Act, section 29, which follows section

1. (1887) 36 Ch.D. 138.
2. (1891) 63 L.T. 762.
3. (1892) 2 Ch. 1.

10 (2) of the Bankruptcy Act of 1883 has been introduced to allow of a similar order for stay of a suit already begun and pending on the date of adjudication, and in that section the language used is "pending against the debtor." I think the same idea must be imported into the old section 16 (2) (*b*).

Of rulings in this country on the exact meaning of the prohibition in section 16 (2) (*b*) there are none which have been brought to our attention except *Vasudeva Kamath* v. *Lakshminarayana Rao*,[4] with which I shall deal later. There are other rulings wherein the section or the same wording in section 17 of the Presidency Towns Insolvency Act (III of 1909) has been invariably applied in practice to suits in which the judgment-creditor is seeking directly to recover his debt from his judgment-debtor. See *Cuddappa Ghouse Khan* v. *Bala Subba Rowther*,[5] *In re Dwarka Das Tejbhandas*,[6] *Pannalal Tassaduq Hussain* v. *Hiranand Jiwan Ram*[7] and *Haji Umar Sharif* v. *Jwala Prasad*[8] or to execution proceedings against the insolvent—see *Easwara Aiyar* v. *Govindarajulu Naidu*.[9] I have myself in an unreported case, *C. R. P. No.* 170 *of* 1926, so applied it to a suit to recover a debt following *Cuddappa Ghouse Khan* v. *Bala Subba Rowther*,[5] and the case in *In re Dwarka Das* v. *Tejbhandas*.[6] My general conclusion then is that section 16 (2) (*b*) prohibits without leave of the Court a creditor from commencing any suit or other legal proceeding which would by its nature hamper or affect prejudicially the administration of the insolvent's estate by the Insolvency Court in the insolvency proceedings. Unless the suit or other legal proceeding thus interferes with the insolvency proceedings, there is no reason why the Insolvency Court should have control over its institution. A party's ordinary civil rights should not be reduced unless by clear statutory authority.

Two points then fall to be decided: first, was the 1st defendant's suit one which falls within the prohibition in section 16 (2) (*b*) so interpreted, and secondly, if it does, does the fact that leave was not obtained entail a total want of jurisdiction in the Court which decided it? The answer to point 1 depends on a consideration of the nature of 1st defendant's suit. By the order on the claim petition the property had been declared to be not the property of the insolvent at all from

4. (1918) I.L.R. 42 M. 684: 36 M.L.J. 453

5. (1927) 53 M.L.J. 412.

6. (1915) I.L.R. 40 B 235.

7. (1927) I.L.R. 8 Lah. 593.

8. (1924) 79 I.C. 662.

9. (1915) I.L.R. 39 M. 689.

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the date of the transfer to the plaintiff, namely, 11th March, 1915. Therefore neither on the date of the insolvency petition nor on the date of the adjudication was this property the property of the insolvent. The adjudication therefore did not vest this property in the Official Receiver. On the date of the 1st defendant's suit it was the property of the plaintiff vesting in him alone. The 1st defendant sued to have it declared that the property was not the plaintiff's but was the property of the insolvent and available for his decree. A perusal of his palint Exhibit G will show that it asserted in effect not that the sale to the plaintiff was a real transfer though fraudulent, but that it was a sham transaction, no consideration having passed and the possession still remaining with the vendors, and that therefeore the property remained the property of the vendors in spite of the sale. But I do not think that makes any essential difference to the legal position. The suit proceeded and had to proceed on the footing that the property was not the property of the judgment-debtor, unless and until the contrary was proved. So long as the sale stood unavoided by proper proceedings the property did not vest in the Official Receiver, nor could he have taken possession of it.

As noted, the 1st defendant's suit was dismissed in the Trial Court and decreed in the Appellate Court. The appellate decree (Exhibit G-2) declared that the insolvent's right to the suit property was established and that the property was liable to be attached in execution of the 1st defendant's decree. It is clear that that suit was not in terms a suit by a creditor against his judgment-debtor to enforce payment of his debt, nor is the declaration which the 1st defendant obtained by his decree the sort of declaration which could have been obtained by him collaterally in the insolvency proceedings. It is no doubt the case that as this alleged sham sale was within two years prior to the insolvency petition the Official Receiver might have moved under Section 36 of Act III of 1907 to have it declared void against him. But that to my mind is not exactly the same relief as was sought for by the 1st defendant in his suit. It has to be remembered, for example, that, if the adjudication was for any reason annulled the result of any successful motion by the Official Receiver to have this sale set aside would not enure to the benefit of individual creditors and would not for the 1st defendant's purposes take the place of the decree which he obtained. He had to be prepared

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or thought it necessary to be prepared for such a contingency by seeking the decree which he obtained. Therefore he was not to my mind seeking in his suit a relief which he could have obtained in the insolvency proceedings itself. By supporting a motion under section 36 by the Official Receiver the exact relief he sought could not have been obtained by him in the insolvency proceedings. It may be noted further that this is not a suit in which the insolvent's estate is involved or is likely to be involved in defence or in costs. It is really a suit prosecuted by the 1st defendant on behalf of the estate and either at his own cost or at the cost of the holders of the property. Neither the insolvent nor the Official Receiver is really a necessary party to it. Again the 1st defendant's suit is not one which could have been filed and conducted by the Official Receiver himself. A suit to set aside an order on a claim petition must be brought by the party against whom the order has been made or by his legal representative. The Official Receiver is in no sense the legal representative of the 1st defendant. This is not a suit to recover assets in the hands of third parties, such as was the suit in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*.[10] It is a suit to declare that the property in the hands of third parties is part of the assets of the insolvent and no more. Hence the 1st defendant's suit cannot be considered to be of such a nature as would hamper or prejudicially affect the administration of the insolvency, and therefore, on the lines I have laid down above, it was not a suit for which the leave of the Court under section 16 (2) (*b*) had necessarily to be obtained.

The learned Judge, whose decision is now under appeal, has no doubt held to the contrary, but if I have read his judgment aright he did so with some hesitation. He felt himself pressed by the decisions of two Benches of this Court in *Vasudeva Kamath* v. *Lakshminarayana Rao*[4] and *Mariappa Pillai* v. *Raman Chettiar*.[11] The case in *Mariappa Pillai* v. *Raman Chettiar*[11] is the converse of the present. There the claim of the person who claimed the property attached by the creditor was dismissed and a suit was filed to establish his claim. It was held in effect that the dismissal of the claim only availed for the benefit of the successful parties to the claim petition and not for the benefit of the Official Receiver, and that there-

4 (1918) I.L.R 42 M. 684: 36 M.L.J. 453

10 (1922) L.R. 49 I.A. 108. I.L.R. 49 C 560: 43 M.L.J. 41 (P.C).

11. (1918) I.L R. 42 M. 322.

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fore the property did not vest in the Official Receiver unless and until he himself avoided the transfer. The appeal, which was by the purchaser from the Official Receiver, was dismissed by the High Court on the ground that the dismissal of the claim did not amount to an avoidance of the transfer by the Official Receiver, that such avoidance can only be by motion under section 36 of the Act and that, in the absence of such avoidance a purchaser from the Official Receiver has no *locus standi,* that is, the Official Receiver cannot by proxy attack a fraudulent transfer in collateral proceedings. This does not seem to me a decision which affects the present case. The successful attaching creditor in the claim petition was not the appellant and his rights were not under consideration. As I read the decision, it does not mean that a suit like the present is not maintainable without leave of the Court, which is the proposition at present under discussion.

As to the case in *Vasudeva Kamath* v. *Lakshminarayana Rao*[4] it was there held that a suit under section 53 of the Transfer of Property Act to set aside a transfer as in fraud of creditors cannot after an adjudication be instituted without leave of the Court. The discussion is meagre and the decision rests on a proposition that such a suit by a judgment-creditor would enable him to obtain satisfaction of his decree out of the property declared in the suit to be the property of the insolvent. With respect, I do not think this is a correct statement. A suit under section 53 of the Transfer of Property Act proceeds on the footing that there has been a transfer although fraudulent, that is, the property has passed from the judgment-debtor. The decree in the suit will not declare that the property transferred is not the property of the transferee but that the transferee's rights are postponed to the rights of the creditors, who are entitled to have their debts satisfied out of it, first of all; if any balance of money or property is left by the creditors after satisfaction it will go not to the judgment-debtor but to the purchaser. As is indicated in *Mariappa Pillai* v. *Raman Chettiar*[11] the decree in such a suit does not enure for the benefit of the Official Receiver who must himself move under section 36 if he wants the transfer set aside. I do not therefore see why the Insolvency Court should require to exercise any control over such a suit, at least until after it has reached the stage of a decree and execution is being taken

4. (1918) I.L.R. 42 M. 684: 36 M.L.J. 453.
11. (1918) I.L.R. 42 M. 322.

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out against the property. If the principles to be held applicable to the present suit which I have stated are correct then the decision in *Vasudeva Kamath* v. *Lakshminarayana Rao*[4] has been set out in too broad terms, but in any case it is distinguishable from the present suit as not being a suit to set aside an order on a claim petition.

It may be noted that even if the application of section 16 (2) (*b*) is restricted to the extent which I have indicated, there will undoubtedly still be cases of hardship as has been in fact recognized in several of the reported cases already quoted. Where a creditor files his suit in ignorance of the adjudication, and the Court is equally ignorant, it is undoubtedly hard that the plaintiff's suit should be dismissed when later on the adjudication comes to light. However, the balance of authority is in favour of that view and I am not prepared at present to canvass it. But it is an added reason why one should not enlarge the scope or the prohibition more than is absolutely necessary on a reasonable interpretation of the section, and for this reason also I would restrict its application to cases where the creditor is suing directly to recover his debt from the insolvent. It will be particularly hard to enlarge the scope of the prohibition and apply it to a suit like 1st defendant's where the creditor must by force of Rule 63 of Order 21 file his suit to set aside the claim order within one year of that order. He has therefore no time to waste or time to wait until he sees whether the Official Receiver is going to move under section 36 or not. For the reasons above given I would hold that 1st defendant's suit was not one for which leave of the Court was necessary under section 16 (2) (*b*). On this finding the discussion of point (2) becomes academic but I shall deal with it shortly.

Before doing so, I shall deal first very briefly with an argument which has been put forward by Mr. T. M. Krishnaswami Aiyar for the respondent, namely that the institution of a suit by an unsuccessful claimant is not a "commencement of a suit" but merely a continuation of the original claim proceedings. It has no doubt been held so for certain purposes; for example, *lis pendens* and Court-fees—see *Krishnappa Chetty* v. *Abdul Kader Sahib*[12] and the Privy Council ruling in *Phul Kumari* v. *Ganshyam Misra*,[13] but that is a proposition

4. (1918) I.L.R. 42 M. 684: 36 M.L.J. 453.
12. (1913) I.L.R. 38 M. 535: 26 M.L.J. 449
13. (1907) L.R. 35 I.A. 22: I.L.R. 35 C. 202: 17 M.L.J. 618 (P.C.).

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which is easily pressed too far. It seems to me contrary to the spirit as well as the letter of section 16 (2) (*b*) that a suit should "commence" at some time earlier than the filing of the plaint in it. If this argument is accepted, an appeal, for example, against the decision in a suit would not require leave although the result of it would be just as hampering to the insolvency proceedings as the original suit itself. If the nature of the claim suit be examined, it is also clear that it is not entirely a continuation of the claim; it embraces something more. The claim enquiry merely settles whether the claimant is in possession of the property on his own behalf or on behalf of the judgment-debtor; but the claimant in his suit has to establish the right which he claims to the property; that is, the question of title is also raised for decision. The suit is therefore really in part a new legal proceeding, and is not entirely restricted to the questions within the scope of the claim enquiry. I am not therefore prepared to accept this argument.

The final question is whether, if leave is necessary the lack of it cuts at the root of the Court's jurisdiction to entertain the suit. The balance of authority is in favour of the position that where leave has not been obtained before the suit was begun it cannot be subsequently obtained—see *In re Dwarka Das Tejbandas*[6] and *Cuddappa Ghouse Khan* v. *Bala Subba Rowther*.[5] The former of these decisions refers to the similar wording under section 17 of the Presidency Towns Insolvency Act. In *Easwara Aiyar* v. *Govindarajulu Naidu*[9] it was clearly held that the omission to get leave is fatal. A ruling in *Pannalal Tassaduq Hussain* v. *Hiranand Jiwan Ram*[7] categorically lays down that initial absence of leave is fatal to the suit even when both the plaintiff in the suit and the Court are in ignorance of the adjudication. It admits that such a ruling will work hardship. The learned Judges in *Cuddappa Ghouse Khan* v. *Bala Subba Rowther*[5] and *Haji Umar Sharif* v *Jwala Prasad*[8] indicate that for such a hardship the present section 29 may be a remedy but the learned Judges in *Pannalal Tassaduq Hussain* v. *Hiranand Jiwan Ram*[7] will not allow even that. So far as direct authority goes it is therefore against the remark of Phillips, J., that in cases under this section "it has been held and consistently held that a suit insti-

5. (1927) 53 M.L.J. 412. 6. (1915) I.L.R. 40 B. 235.
7 (1927) I L.R. 8 L. 593 8 (1924) 79 I.C. 662.
9. (1915) I.L.R. 39 M. 689.

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tuted without leave can be validated by obtaining leave subsequently."

Much discussion at the Bar has been devoted to argument from analogies, but I must confess that I find such analogies of little use. The wording of section to be interpreted in the case of such analogies is of course different and it is on the exact wording of this section that we have to make up our minds. The language employed in the consideration of the points at issue in some of these rulings at times falls, it appears to me, into tautology. If some preliminary sanction or leave is essential before the Court can try a suit, then of course the Court has no jurisdiction without it, while if that preliminary can be "waived" then it does not affect the jurisdiction. That seems to me merely saying the same thing in two different ways. I therefore do not propose to discuss here the "essential nature," for example, of leave under section 12 of the Letters Patent, or the sanction which has to be obtained under section 92, Civil Procedure Code or of a notice under Order 21, Rule 22 in an execution petition, since to attempt to interpret other sections with different wordings only increases difficulties and is more of a danger than a help I would say this, however, on this point that the prohibition in section 16 is directed not to the Court but to the party, and that therefore, when the party was wholly ignorant of the adjudication it is difficult to penalise him for not bringing to notice a matter of which he was wholly ignorant. It surely has not to be laid down that every person suing in the capacity of a creditor must add to his plaint a verification that his debtor has not yet been adjudged an insolvent. What is required is that a defence by way of a plea of want of leave shall not be denied to the debtor in the suit if he really has been adjudicated insolvent, and, if he does raise the defence of want of leave, then the Court shall dismiss the suit or permit it to proceed upon terms; but if he does not raise the defence, it appears to me the proper order would be to rule that the objection has been waived and cannot be later pressed. There is not really here any inherent want of jurisdiction. The prohibition is merely a restraint on the exercise of jurisdiction, and is a matter of procedure. In any case it appears to me that the party who is really restrained by section 16 (2) (*b*) is the party who is in a position then and there to collect his debt and who is actually trying by means of the suit or legal proceeding to do so.

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For the reasons given above I would not interfere with the decision given by the learned Judge and I would dismiss this appeal with costs.

Thiruvenkatachariar, J.

Thiruvenkatachariar, J.—The questions raised in this appeal relate to the scope and effect of sub-section (2) of section 16 of the Provincial Insolvency Act of 1907. In execution of a money decree which the 1st respondent had obtained against defendants 2 to 4, he attached on the 25th June, 1915, certain properties as belonging to his judgment-debtors. Thereupon the appellant preferred a claim to those properties on the 28th July, 1915, the claim being based on a sale-deed executed in his favour by the judgment-debtors on the 11th March, 1915. The claim was allowed on the 8th November, 1915 and the properties were released from the attachment. On the 16th November, 1915 respondents 2 and 3 were adjudged insolvents. On the 31st March, 1916 the 1st respondent filed a suit under Order 21, Rule 63, Civil Procedure Code impleading as defendants therein the appellant and respondents 2 to 4. In that suit he prayed for a decree declaring that the attached property belonged to his judgment-debtors (defendants 1 to 3 in the suit) and was liable to be attached in execution of the decree obtained by him against them. The Official Receiver was not made a party to that suit. The Trial Court dismissed the suit, but on appeal to the District Court of Kistna that decree was set aside and a decree was passed in favour of the 1st respondent as prayed with costs. From the appellate decree a Second Appeal was preferred to the High Court which was dismissed. The appellant then brought the present suit in the District Munsif's Court of Bezwada impleading as defendants not only respondents 1 to 4 who were the other parties in the previous suit, but also the Official Receiver of Kistna as the 5th defendant in this suit. He prays for a declaration that the decree in the previous suit is null and void and for an injunction restraining the 1st respondent from executing the decree. His case is that the decree in the previous suit which was brought by the 1st respondent against him was passed without jurisdiction. As respondents 2 and 3 had already been adjudged insolvents that suit could not be filed without the leave of the Court obtained therefor under section 16 (2) of the Provincial Insolvency Act, 1907, and as such leave was not obtained the Court had no jurisdiction to entertain it and the decree passed therein is null and void, notwithstanding that no objection was raised in that suit itself to its maintainability on the ground of want of leave of

the Insolvency Court under section 16 (2) of the Act. The Trial Court dismissed the suit. On appeal therefrom, the Sub-Court of Kistna set aside that decree and passed a decree in plaintiff's favour as prayed. Against that decree the 1st respondent preferred a Second Appeal to this Court which came on for hearing before Phillips, J. The learned Judge held that the plaintiff (appellant) is not entitled to the declaration asked for and that his suit must be dismissed.

This appeal is filed under the Letters Patent against that judgment. The main questions considered by the learned Judge are: (1) whether the present suit instituted by the 1st respondent was one for the filing of which the leave of the Insolvency Court was necessary, and (2) if so, whether the fact that no leave was obtained therefor would render the decree passed in the suit a nullity.

On the first question the learned Judge holds that it was a suit falling within section 16 of the Provincial Insolvency Act and that the leave of the Court should have been obtained for instituting the same.

On the second question he holds that the absence of leave did not affect the inherent jurisdiction of the Court to try the suit. A suit instituted without leave can be validated by the leave being granted subsequently. The absence of leave may be put forward as a defence to the suit, but if the defendant does not raise that defence he must be deemed to have waived it and a decree passed after such a waiver cannot be deemed to be a nullity. He further observes that the decree obtained by the appellant (plaintiff) only gives him a declaration and that he cannot execute it against the insolvent. He holds also that the Official Receiver was not a necessary party to the previous suit and the only result of his not being made a party thereto is that he is not bound by any decree passed therein.

The questions which arise for consideration are:—

(1) Was leave of the Insolvency Court under section 16 (2) of the Provincial Insolvency Act of 1907 necessary for the commencement of the suit brought by the 1st respondent to contest the order passed in the appellant's favour allowing his claim to the properties attached by the former as judgment-creditor of the respondents 2 to 4?

(2) If such leave was necessary, does the fact that the suit was instituted without leave render the decree passed therein a nullity?

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After a full consideration of the arguments on both sides I am of opinion that both the questions should be answered in the negative. With reference to the first question the nature of the suit has to be considered. It is, as pointed out by Phillips, J., a suit under Order 21, Rule 63, Civil Procedure Code. Such a suit whatever may be the form of relief prayed in it is really a suit to set aside a summary order passed in a claim proceeding which if not set aside by the aggrieved party by bringing a suit to establish the right which he claims to the property in dispute becomes conclusive as between the claimant and the attaching decree-holder as to the title of the property. See *Phul Kumari* v. *Ghanshyam Misra.*[13]

Under Art. 11 of the Limitation Act the suit has to be brought within one year from the date of the summary order. Where the claim has been allowed, the suit can be brought only by the attaching creditor and in such a suit he acts only for himself and not on behalf of the creditors generally and any adjudication passed therein will be binding only as between him and the claimant. It will not affect the rights of the other creditors or of the Official Receiver in whom the judgment-debtor's estate has vested either prior to the institution of the suit or subsequent thereto. It has also been held that to such a suit brought by an attaching creditor the judgment-debtor is not a necessary party nor the Official Receiver where the judgment-debtor has been adjudged an insolvent after the summary order has been passed. See *Chaudhri Ahmad Baksh* v. *Seth Raghubar Dayal*[14] and *Annapurni Ammal* v. *Subramaniar Chettiar*[15] which is a decision of Wallis, J. (as he then was) and Munro, J. The usual relief claimed in such a suit is a declaration that the property attached was the property of the judgment-debtor and not that of the claimant. The attaching decree-holder cannot in that suit pray for any further relief. If he succeeds in getting the declaration that the property belongs to the judgment-debtor he has thereafter to apply to the Court executing the decree to proceed further on his application for execution, the obstacle in the way which was created by the order allowing the claim having been removed. It is only in such an application when made, the judgment-creditor seeks relief against the property of the judgment-debtor.

The institution of the suit under O. 21, R. 63 is merely for the purpose of removing the obstacle which lies in the way of his

13. (1907) L.R. 35 I.A. 22: I.L.R. 35 C 202: 17 M.L.J 618 (P.C.)
14. (1905) L.R. 32 I.A. 229: I.L.R. 28 A. 1: 15 M.L.J. 432 (P.C.)
15. (1908) I.L.R. 31 M. 347.

making such an application and the suit is not one in which any relief is sought against the property of the judgment-debtor. This is the view taken by Phillips, J., himself in the order appealed from. I respectfully think that the logical consequence of this view is to hold that the suit brought by an attaching creditor under Order 21, Rule 63 is not one which comes within the purview of section 16 (2) of the Act. But the learned Judge is of opinion that though the suit does not seek any remedy against the property of the insolvent, it is a suit in respect of what is alleged to be the property of the insolvent and therefore it appears to come within the meaning of S. 16 (2) and that the leave of the Court should be obtained. That such a suit in so far as it prays for a declaration that the attached property belongs to the judgment-debtor is not obnoxious to section 16 (2) is supported by the case in *Annapurni Ammal* v. *Subramanian Chettiar*[15] already referred to. In that case, the judgment-debtor was adjudged an insolvent during the pendency of the claim proceedings. The claim being allowed the attaching decree-holder sued under section 283, Civil Procedure Code (now Order 21, Rule 63) making the Official Receiver also a party. An objection was taken to the maintainability of the suit on the ground that as the insolvent's property had vested in the Official Receiver, he alone could bring a suit and that the suit by the attaching creditor was not maintainable. The objection was overruled, the learned Judges observing that the decree-holder against whom the order has been passed had a statutory right of suit to set aside the order passed in the claim proceeding. The Official Receiver is not a necessary party to such a suit. As to the relief the plaintiff is entitled to, they observe as follows:

> "The decree-holder, however, after the judgment-debtor's insolvency is not entitled to a decree declaring the property liable to be attached; but he is entitled to a decree declaring that the property is that of the judgment-debtor." See *Annapurni Ammal* v. *Subramanian Chettiar*[15]

Though in that case the question did not arise under section 16 (2) of the Provincial Insolvency Act of 1907, as the insolvency took place before that Act was passed, yet, I respectfully think that the distinction which the learned Judges draw between granting a mere declaration that the property belongs to the judgment-debtor and granting a further declaration that the property is liable to attachment is one which is equally applicable to section 16 (2) of the Act of 1907. In

15. (1908) I.L.R. 31 M. 347 at 348, 349.

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the previous suit brought by the attaching decree-holder, he got both those declarations. But for his purposes it would have been quite sufficient if the declaration that the property belonged to the judgment-debtor alone is maintainable. It may also be pointed out that as the Official Receiver was also a party to the suit in *Annapurni Ammal* v. *Subramanian Chettiar*,[15] the declaration that the property was liable to attachment ought not to be granted as after the adjudication of the judgment-debtor, the judgment-creditor has no right to attach the property but will be entitled to such relief as he can get in the insolvency proceedings, and that portion of the decree which would be binding on the Official Receiver as a party to the suit had therefore to be struck out. But in the previous suit with which we are here concerned, the Official Receiver was no party and the declaration that the property was liable to be attached in execution of the plaintiff's decree will not affect the rights of the Official Receiver.

Turning to the provisions of section 16 (2) I am unable to find anything in it which brings a suit under Order 21. Rule 63 within its purview. It provides that on the making of an order of adjudication—

(1) All the properties of the insolvent shall vest in the Court or the Receiver.

(2) No creditor of an insolvent in respect of any debt provable in the insolvency has during the pendency of the insolvency proceedings any remedy against the property of the insolvent in respect of the debt.

(3) That no such creditor can commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose.

Does the suit under O. 21, R. 63 infringe any of these provisions? It is clearly not a suit for the recovery of any property vested in the Receiver. According to the order on the claim petition if not set aside, the property did not belong to the judgment-debtor. Secondly, the asking for a declaration that the property belonged to the judgment-debtor is not asking for a relief against the property of the judgment-debtor. To determine the nature of the suit, we have to look at the relief which is prayed for in the suit and not to the ulterior consequences that may result from the granting of the relief. This is the view taken in *Annapurni Ammal* v. *Subramanian Chettiar*[15] which is already referred to. But as against this view the case in *Vasudeva*

15. (1908) I.L.R. 31 M. 347.

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Kamath v. *Lakshminarayana Rao*[4] is relied on. In that case certain creditors of the insolvent sued under section 53 of the Transfer of Property Act for setting aside a sale of property which had been made by the debtor prior to insolvency. Wallis, C.J., delivering the judgment of the Court, held that the suit fell within the purview of section 16 (2). The learned Chief Justice observes that under the corresponding provisions of English Law, a judgment-creditor may sue in respect of his debt alone and obtain satisfaction for it. If the same rule is to be applied to a suit by the judgment-creditor under section 53 of the Transfer of Property Act it follows that if he obtains a decree in his favour he can also enforce it in those proceedings. That would clearly bring the suit within the purview of section 16 (2) under which a creditor has no remedy against the property of the judgment-debtor. But the learned Chief Justice says further:

"even as regards a suit by a creditor who was not a judgment-creditor to declare a transfer void against creditors generally I think the words of the sub-section 'or commence any suit or other legal proceeding' are sufficiently wide to cover a suit to make property available as the property of the judgment-debtor and to forbid the institution of such a suit as this without the leave of the Court."

In taking this view, the learned Judge seems to me to have overlooked the distinction drawn by himself in *Annapurni Ammal* v. *Subramanian Chettiar*[15] between a relief by way of a declaration that the property belongs to the judgment-debtor and a further relief that the property is liable for attachment and that the latter relief alone would be obnoxious to the policy of Insolvency Law. Moreover in this case in *Vasudeva Kamath* v. *Lakshminarayana Rao*[4] there was no question of the rights of an attaching creditor against whom an order has been passed in the claim proceedings which would be conclusive against him unless and until it is set aside by a suit instituted by him. No doubt the words of the sub-section "no creditor shall commence any suit or other legal proceeding" are very wide, but they should be construed as applying only to suits brought by creditors which seek any relief against the property or person of the judgment-debtor or which can in any manner prejudice the administration of the insolvent's estate by the Insolvency Court or the rights of the Receiver as representing the general body of creditors. It is difficult to see how a suit by an attaching creditor under Order 21, Rule 63 can prejudice the rights of

4. (1918) I.L.R. 42 M. 684: 36 M.L.J. 453.
15. (1908) I.L.R. 31 M 347.

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the Receiver. If the suit is successful the Receiver cannot be prejudiced thereby even if he cannot derive any advantage from such a decision. If, on the other hand, it is unsuccessful it will not be binding on the Receiver and it is still open to him to sue for the recovery of the property. But so far as the attaching creditor is concerned he is bound by an adjudication against him and if he does not institute a suit under Order 21, Rule 63, within one year, he runs the risk of altogether losing his right to attach the property for the recovery of his debt, even if the adjudication is annulled.

The question may also be looked at in another way. Section 16 (2) of the Provincial Insolvency Act, 1907, is re-enacted in section 28 (2) of the present Provincial Insolvency Act and so far as this point is concerned, the wording is exactly the same. The scope and operation of section 28 (2) cannot but be the same as that of section 16 (2) of the old Act. In the present Act there is a new provision section 29, which also bears on the question. Section 29 says:

> "Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding or allow it to continue on such terms as such Court may impose"

This new section makes it quite clear that the suit or other legal proceeding which is dealt with by sub-section (2) of section 28 is one against a debtor for the recovery of the debt. Sections 28 and 29 of the present Act correspond to sections 7 (1) and 9 (1) of the English Bankruptcy Act, 1914, the language of which also is almost identical. In section 9 (1) of the English Act the proceedings against the debtor which are to be stayed on proof of bankruptcy are referred to as "any action, execution, or other legal process against the property or person of the debtor." There can be hardly any doubt that the suit or other legal proceeding which fall within the purview of section 28 of the Provincial Insolvency Act (corresponding to section 16 of the Act III of 1907) is an action, execution, or other legal process against the person or property of the debtor. It follows therefore that a suit by an attaching creditor under Order 21, Rule 63 in which no relief is sought against a debtor but in his favour and to which neither the debtor nor the Receiver is a necessary party cannot be held to be a suit falling under S. 16 (2) of the old Act or section 28 (2) of the present Act. I am therefore of opinion that the previous suit brought under Order 21, Rule 63 was not a suit for which leave of the Court was necessary under section 16 (2) of the old Act.

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On the second question I agree with the learned Judge that assuming that leave of the Insolvency Court was necessary for the institution of the suit, the fact that no such leave was obtained does not render the decree passed therein a nullity. The word "jurisdiction" is often used in a loose sense. A Court is said to be acting without jurisdiction not only when it has no power or authority to hear and determine the cause at all, but also when in the exercise of its authority to decide, it acts or decides erroneously.

But as pointed out by Mookerjee, C.J., in *Hriday Nath Roy* v. *Ram Chandra Barna Sarma*[16] there is a clear distinction between the jurisdiction of the Court to hear and determine a matter and the erroneous action of that Court in the exercise of that jurisdiction. The authority to decide a cause at all, as observed by the same learned Judge, and not the decision rendered therein is what makes up jurisdiction, and when there is jurisdiction of (over) the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. If the Court has no power to act at all, its doing so will be a mere usurpation of authority and its decree will be a nullity, but if it merely acts erroneously in the exercise of its jurisdiction the error can be set aside only by taking further proceedings in the action itself by way of appeal or otherwise. It can be avoided only in that way and if not so avoided its correctness cannot be questioned collaterally in other proceedings.

In the present case the previous suit was one which the Court in which it was instituted was competent to try. It had jurisdiction over the parties as well as the subject-matter of the suit. The question whether the suit could be maintained without the leave of the Insolvency Court did not affect the competency of the Court to try the suit, but it was only a question which might have been raised for determination in the suit. Supposing that point had been raised in that suit itself, whether leave of the Insolvency Court was necessary, it was quite open to the Trial Court to decide that question in the affirmative or in the negative and its decision may be right or erroneous. But it cannot be said that it had no jurisdiction to decide it. An erroneous decision on that point can be avoided only by an appeal against a decree passed in that suit. If the point had not been raised at all it would on principle make no difference. The Court's inherent jurisdiction to try the suit is not thereby affected. The question whether leave of the Insolvency Court for

16. (1920) I.L.R. 48 C. 138 at 147 (F.B.).

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the institution of the suit is necessary is not a question which arises on the face of the plaint itself if the insolvency is not referred to therein. It depends on extraneous circumstances of which neither the plaintiff nor the Court may be aware. Suppose the plaintiff, for no fault of his, is not aware of the adjudication and therefore files his suit without getting leave of the Insolvency Court. Is his suit liable to be dismissed on the ground that he has commenced it without leave of the Court? Such a conclusion will be obviously unjust and I can see nothing in the wording of the section to justify such a conclusion. The material words are: "No creditor shall commence his suit without leave of the Insolvency Court." It is clear that the leave of the Insolvency Court has to be obtained for the commencement of the suit. I think that the direction given to the creditors of an adjudged insolvent by those words proceeds on the assumption that the creditor is aware of the adjudication. If, being aware of it, he fails to obtain leave he is penalised and properly so; but if for no fault of his, he is not aware of the adjudication, and of the consequent necessity for obtaining leave of the Court he cannot be said to have commenced, *i.e.*, knowingly commenced the suit without leave and he ought not therefore to be treated as if he were in default. That this is the correct view to take seems to me to be supported by the decisions in the analogous cases arising out of section 43 of the old Civil Procedure Code corresponding to Order 2, Rule 2 of the present Code.

In *Amanat Bibi* v. *Imdad Husain*[17] their Lordships of the Privy Council observe that a plaintiff cannot be held to have omitted to sue for a right of which he was not aware when he instituted the suit and that such an omission does not preclude him from maintaining a subsequent suit for the portion so omitted. In other words, the omission ought to be an intentional omission with knowledge of the facts. *Des Raj* v. *Dunichand*[18] is also an authority on the point. In that case Mr. Justice Broadway has held that a suit instituted by a creditor without notice of the adjudication cannot be dismissed on the ground that leave of the Insolvency Court was not obtained. In this case no question appears to have been raised as to whether the plaintiff before he instituted the previous suit had knowledge of the adjudication. The question is therefore relevant only for this purpose, *viz.*, that obtaining leave is not a condition pre-

17. (1888) L.R. 15 I.A. 106· I.L.R 15 C. 800 (P.C.).
18. (1920) 60 I.C. 588.

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cedent to the competency of the Court to try the suit. It is only available as a defence to the suit if well-founded and the decree of the Court on the point will be binding on the parties and if erroneous can be set aside only by an appeal or some appropriate proceeding in the suit itself. If the plea is not set up in the suit or proceeding as it happened in the present case, the decree passed in it cannot be challenged in any subsequent proceeding on the ground of want of leave for the institution of the suit. It has been so held in cases falling under clause (12) of the Letters Patent in which the leave of the Court is necessary for the institution of the suit in the High Court, but the suit is instituted without leave. In such cases the plea as to the jurisdiction of the Court on the ground of want of leave if raised by the defendant would be fatal to the suit but if it is not raised and the suit is tried and decreed the decree cannot subsequently be attacked as a nullity. See *Ganesh Narayan Sahi Deo* v. *Manik Lal Chandra.*[19] I have only to add that both under clause (12) of the Letters Patent and S. 16 (2) of the Provincial Insolvency Act, 1907, the leave required has to be obtained before the suit is instituted and the observation of the learned Judge that a suit instituted without leave can be validated by obtaining leave subsequently does not appear to be correct nor his statement that it has been consistently so held borne out by any authorities cited to us; but that error does not vitiate his conclusion on the question. Lastly as to two cases, *Easwara Aiyar* v. *Govindarajulu Naidu*[9] and *Raghunath Das* v. *Sundar Das Khetri*[20] which were strongly relied on by the appellant's Advocate in support of his contention on this question.

In the first case all that this Court decided was that after the adjudication of the judgment-debtor by the High Court under the Presidency Towns Insolvency Act (III of 1909) his judgment-creditor cannot apply for execution of the decree by arrest of the insolvent without obtaining the leave of the Insolvency Court, *i.e.*, the High Court. In this case the Presidency Small Cause Court which passed the decree was aware of the adjudication. Nevertheless it entertained an application for the execution of the decree by the arrest of the insolvent and the latter got himself released by getting a surety to execute a bond for his appearance. The order of the Small Cause Court proceeded on the view that section 17 of the Presidency Towns Insol-

9. (1915) I.L.R. 39 M. 689. 19. (1923) 76 I.C. 194.
20 (1914) L.R. 41 I.A. 251: I.L.R. 42 C. 72: 27 M.L.J. 150 (P.C).

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vency Act only took away the creditor's remedy against the property of the insolvent and not also his remedy against the person of the insolvent as in the corresponding section 16 (2) of the Provincial Insolvency Act. Against the order allowing execution there was an application to the Full Bench of that Court for a new trial and owing to a difference of opinion between the Judges constituting the Full Bench the question was referred to the High Court whether after the adjudication the Court could entertain the application for execution of the decree by arrest and the bond taken from the surety could be enforced. The learned Judges who heard the reference (Napier and Sadasiva Aiyar, JJ.) held that after the adjudication of the judgment-debtor the Small Cause Court had no power to entertain the application for the execution of the decree whatever may be the relief claimed and in that view the order must be set aside This is a case which arose directly between the creditor and the insolvent and the surety and the order passed therein was questioned and set aside as illegal in a new trial application preferred against it. In other words, the illegal order was vacated by an appeal against it.

In *Raghunath Das* v. *Sundar Das Khetri*[20] the property of an insolvent which had been attached by his judgment-creditor prior to his adjudication was after the adjudication sold in execution of the decree and purchased by the decree-holder himself who also got possession thereof. After the adjudication the Official Assignee was, on the application of the decree-holder, added as a party to the suit but no application was made under section 248 (old Code) (now Order 21, Rule 16) to execute the decree against him as representative of the judgment-debtor (insolvent). The Official Assignee subsequently sold the property and the purchaser brought a suit to recover possession of the property from the decree-holder purchaser. Their Lordships held that the Official Assignee was not bound by the sale held in execution proceedings to which he was not made a party and which he could have successfully opposed and that the title to the property which had vested in him prior to the sale was not therefore affected by the sale. The question as to the validity of the sale as against the Official Assignee was no doubt raised in a subsequent proceeding but the case decided no more than this; that a person's title to property cannot be affected by any proceedings to which he is no party. It lends no support to the contention that an order passed by a Court in a matter over which it

20. (1914) L.R. 41 I.A. 251; I.L.R. 42 C. 72. 27 M.L.J. 150 (P.C).

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has jurisdiction against a person who is made a party to the proceedings in which the order is passed is open to attack collaterally in a subsequent proceeding as a void order.

I am opinion that the answer to the second question also should be in the negative.

I therefore concur in the order proposed by my learned brother.

N.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE AND SIR JOHN WALLIS.

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Sennimalai Goundan v. Sellappa Goundan.

Sennimalai Goundan and another .. *Appellants** (*Plffs.*)

v.

Sellappa Goundan and others .. *Respondents* (*Defts.*).

Hindu Law—Joint family—Partition—Fraud—Re-opening of partition on ground of—Suit for—Onus on plaintiff in—Points to be considered in such a suit—Minor grandson—Suit by, to re-open partition made by grandfather between his sons, one of whom was plaintiff's father

The plaintiff sued to re-open a partition made by his grandfather and his four sons, one of whom, *K*, was the plaintiff's father, at a time when the plaintiff, who was *K's* son by his first wife, was about four years old. At that time *K* had separated from the plaintiff's mother and had married a second wife, and the plaintiff's case was that that partition was effected by all the adult members of the family with the deliberate object of defrauding him of his share in the properties which ought to have fallen to his father and himself at the partition.

Held, that the case set up by the plaintiff was in itself highly improbable, and required to be established by very clear and satisfactory evidence, that the question, at the root of such a case, was whether the share allotted to the plaintiff's father was really inferior in value to that which was allotted to his brothers, because if it was not the basis of the plaintiff's whole case failed; and that mere acreage was not a satisfactory test of value, as so much depended upon the productivity of the lands allotted to each share.

Held further, on the evidence, affirming the High Court, that the plaintiff had altogether failed to make out the alleged fraud.

Appeal No. 145 of 1927 from a judgment and decree, dated the 26th August, 1925 of the High Court, Madras (Coutts Trotter, C.J. and Viswanatha Sastri, J.), modifying a decree, dated the 22nd April, 1922 of the Additional Subordinate Judge of Coimbatore.

The facts of the case are set out sufficiently in the judgment of the Judicial Committee.

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*P.C. Appeal No. 145 of 1927. 14th December, 1928.

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De Gruyther, K.C. and *K. Brown* for appellants.

Lowndes, K.C. and *Narasimham* for respondents.

14th Dec. 1928. Their Lordships' judgment was delivered by

SIR JOHN WALLIS.—This is an appeal from a decree of the High Court at Madras reversing a decree of Mr. R. W. Davies, I.C.S., Additional Subordinate Judge of Coimbatore, in a suit brought by the plaintiff in February, 1919, to reopen a partition made by his grandfather and his four sons, one of whom, Karuppa, was the plaintiff's father, in the year 1905, at a time when the plaintiff, who was Karuppa's son by his first wife, was about four years old. At that time Karuppa had separated from the plaintiff's mother and had married a second wife, and the plaintiff's case is that this partition was effected by all the adult members of the family with the deliberate object of defrauding him of his share in the properties which ought to have fallen to his father and himself at the partition. Paragraph 7 of the plaint states:

"That the said Karuppa and his father and brothers with the intention of defrauding the plaintiff of his legitimate share in the family properties and benefiting themselves . . . entered into a fraudulent and collusive partition."

The Subordinate Judge found that the plaintiff's case was proved and decreed the suit. On appeal the case came before the learned Chief Justice and Mr. Justice Viswanatha Sastri, who delivered the judgment of the Court. The learned Judges were of opinion that the plaintiff had altogether failed to make out the alleged fraud and consequently allowed the appeal and varied the decree of the Lower Court by decreeing a partition between the plaintiff and his half-brother, the ninth defendant, of their admittedly joint properties.

As observed by the learned Judge, a case of this kind must be established by very clear and satisfactory evidence.

At the root of the case is the question whether the share allotted to the plaintiff's father was really inferior in value to that which was allotted to his brothers, because if it was not the basis of the plaintiff's whole case fails. As is observed in the appellate judgment, the Subordinate Judge has found this issue in favour of the plaintiff on very unsatisfactory and unsubstantial grounds. He has compared the acreage of the land allotted to the different shares and has decided that the partition must have been unequal because the acreage allotted to Karuppa is less than what was allotted to the other brothers. As is pointed

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out by the Appellate Court, mere acreage is not a satisfactory test of value, as so much depends upon the productivity of the lands allotted to each share. The force of this observation is much strengthened by a statement compiled by Sir George Lowndes, who appeared for the respondents, of the assessments on each share as shown in the partition deed.

The assessment on the lands allotted to Sellappa, the first defendant, amounted to Rs. 106-6-6. The assessment on the lands allotted to Karuppa, the plaintiff's father, amounted to Rs. 89-10-10. The assessments on the two shares allotted to the fifth and seventh defendants amounted to Rs. 172-3-2, making for each of them an assessment of Rs. 86-9-7, in addition to which they each received Rs. 1,500 in cash.

At the first sight, on these figures the share allotted to Karuppa seems smaller than that allotted to the other brothers. but the case assumes a very different aspect, when it is observed that of the Rs. 89-10-10, Rs. 23-10-6 is not the full assessment, but only a favourable quit-rent payable to Government on the *inam* lands in question. It does not appear what proportion exactly of the assessment the *inamdar* was required to pay over to Government by way of quit-rent and what proportion he was entitled to retain for himself; but in any case there can be little doubt that by adding the full assessment of this *inam* land to the assessment on the other lands which fell to Karuppa's share, it would have more than equalled in value the shares allotted to his brothers.

The Subordinate Judge next referred to the fact that, during the hearing of the case, the first defendant, Sellappa Goundan, the plaintiff's uncle, to whom one of the shares was allotted at partition, offered to exchange his share with the plaintiff's, and that the fifth and seventh defendants, who were also the plaintiff's uncles, and to whom one share had been allotted in common, also offered to exchange half of their share with him, alleging that the share that fell to the plaintiff's father was by 10 per cent. more valuable than theirs. The Subordinate Judge states that they afterwards backed out of this offer and infers from this that the shares were not really of equal value. In their Lordships' opinion, this inference is not justified. It appears from the note made at the time that, when the defendants made this offer and the plaintiff accepted it, the Court then stated that the matter was closed so far as A, B and C schedule lands were concerned—that is to say, the lands allotted at partition, but intimated that the suit was to go on

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against the defendants in possession of E, F and G schedules— E schedule being the lands which it is said were really allotted to Karuppa, as well as the lands in B schedule, but were put *benami* in the names of his second wife Nachakkal. It appears to their Lordships that the defendants may well have understood that the exchange which they offered was to be in settlement of the suit, and that no inference is to be raised against them, because they withdrew their offer when they found that the Subordinate Judge required the case to go on as to whether E schedule properties were really conveyed to Nachakkal *benami* for her husband, the plaintiff's father.

The learned Subordinate Judge also found that if the lands in E schedule had been allotted to Karuppa, as well as the lands in B schedule, his share would have been somewhat in excess of those allotted to his brothers, but that, owing to other circumstances, would have been approximately fair. This method of comparing acreage, as already pointed out, is extremely fallacious.

It was argued that the plaintiff was not in a position to prove his case because the defendants had failed to produce their documents; but when the defendants produced them at a late stage of the case the plaintiff, as observed by the learned Judge, instead of utilising them as he might have done, successfully resisted the defendant's application to file them. Apart from this, there is really no substance in this contention, because the only documents likely to be of much use were the sale deeds showing the sums for which many of the lands included in the schedule had been purchased, and the plaintiff could easily have obtained copies of these documents from the registration office and have exhibited them as secondary evidence in the usual way when the defendants had failed to produce the originals.

In this state of the evidence their Lordships agree with the High Court that the plaintiff has altogether failed to show that on partition a smaller share was allotted to Karuppa than to his brothers, and if he has not proved that his father Karuppa's share was inferior to that of his brothers, he has, of course, also failed to prove that the inferior share was allotted to Karuppa for the purpose of defrauding the plaintiff.

The story that the plaintiff's grandfather, who was dividing nearly all his property, ancestral or self-acquired, between four sons, and his four sons themselves all joined in entering into a conspiracy for the purpose of injuring this child of four years because his mother had quarrelled with her husband

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Karuppa, who was one of the four brothers, is in itself highly improbable; and as the whole basis of the plaintiff's case fails, it is only necessary to refer very briefly to the evidence as to the means by which the alleged fraud was effected and part of the property which falls to Karuppa put *benami* in the names of other persons.

In the first place, it is said that contemporaneously with the partition deed the lands in E schedule which, it is said, formed part of Karuppa's share, were conveyed to Karuppa's second wife, Nachakkal, by the sale-deed (Exhibit D) of the 7th July, 1905. The sale-deed recited that the vendor, Sennimalai Goundan (the plaintiff's grandfather) had conveyed to Nachakkal "the undermentioned properties for Rs. 1,000 towards the amount to be paid to Vellai Goundan and Subbi Goundan in pursuance of the deed of partition effected among my four sons." Under the partition deed, as already mentioned, these two sons were to receive Rs. 3,000 in addition to the land allotted to them, and these properties are said to have been sold by the grandfather for the purpose of raising Rs. 1,000 for this purpose. They were described in the deed as having been acquired by Sennimalai and in his enjoyment. If they were his self-acquired property he was not bound to bring them into partition and was entitled to do with them as he liked. It is not disputed that Nachakkal, who was the only daughter of a wealthy lady, was well in a position to find Rs. 1,000 for the purchase money if she desired to do so. Apart from proof that the share allotted to Karuppa was less than that allotted to his brothers, this transaction affords no evidence whatever of the fraud which the plaintiff seeks to establish.

It is true that Nachakkal has come forward to give evidence that the transaction was a bogus one and that she never paid the consideration for the sale, but she admitted execution before the Registrar after the document had been explained to her and her story that she was ignorant of the nature of the transaction cannot be accepted. Further, in this very case she filed a written statement on behalf of her son, the ninth defendant, the plaintiff's half-brother, in which she adopted the written statement of some of the other defendants, denying that there was any truth in the case set up by the plaintiff; and, as observed in the judgment of the High Court, it is clear that in her evidence she went back on her written statement at the instance of her son, the ninth defendant, who found it to his interest to join with the plaintiff in attacking the sale-deed

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(Exhibit L), referred to below, by which she had parted not only with some of the properties conveyed to her by Exhibit D, but also with the whole of the *stridhanam* properties she had inherited from her mother.

It was also alleged by the plaintiff that, in further prosecution of this fraudulent scheme on the 27th September, 1905, Nachakkal re-conveyed to Sennimalai, the plaintiff's grandfather, for Rs. 400 part of the property which had been conveyed to her under Exhibit D, and it was suggested that the properties so re-conveyed were possessed and enjoyed by Karuppa. The evidence, however, shows that, on Sennimalai's death, Karuppa only claimed and only took his one-fourth share of these properties, leaving the remaining three-fourths to be taken by his brothers, which shows that Nachakkal's conveyance to him was not, as suggested *benami* for Karuppa. The evidence is that this particular property has enormously increased in value since the partition owing to its being planted with cocoanut trees, and is now worth Rs. 30,000, and the learned Judges are probably right in surmising that the plaintiff was induced to bring the present suit with the object of getting the whole of this increment for his branch.

Reliance is also placed on a trust deed executed by Karuppa on the 2nd October, 1909, not long before his death, by which he conveyed all his properties to his brother Vellai Goundan and his kinsman Rangaswami Goundan on trust to manage them during the minority of his two sons, the present plaintiff and Nachakkal's son, the ninth defendant, and to make over their shares to them as soon as they obtained majority. Some point was made of the fact that he provides for a payment of Rs. 60 a year out of certain lands to Nachakkal and her son, whereas he makes no provision for his first wife and the plaintiff. There is no force in this contention, as it appears that a similar provision was made for the plaintiff's mother when she separated from her husband before the partition.

Lastly, reliance was placed on Exhibit L, a sale-deed of 25th June, 1911, by which Nachakkal conveyed to Ramaswami Goundan, one of the trustees of the deed last mentioned, the remaining properties which had been conveyed to her in the first instance by Sennimalai under Exhibit D, and in addition to all the *stridhanam* properties which she had inherited from her mother. The price was Rs. 5,000, Rs. 4,000 of which was to be for the discharge of a promissory note which it was said she had executed on the 21st March, 1908, for Rs. 3,000 in favour

of Subbi Goundan, the seventh defendant. The promissory note has not been produced, and it is not shown how it was that she came to execute it or the subsequent sale-deed. The fact that Rangaswami Goundan, the vendee, was not called by the defendants has been the subject of comment, but it has been suggested in explanation that he was unwilling to go into the box because this sale-deed, in so far as it deals with Nachakkal's *stridhanam* properties, is being attacked by her son, the ninth defendant, in another suit. Whatever may have been the real nature of this transaction, it cannot help the plaintiff in this suit in the absence of satisfactory evidence that his branch of the family was allotted an unequal share at the partition which he is seeking to re-open.

For these reasons, in their Lordships' opinion, the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Douglas, Grant & Dold.*

Solicitors for respondents: *Chapman, Walker & Shephard.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE AND SIR JOHN WALLIS.

Lewis Pugh Evans Pugh .. *Appellant**

v.

Ashutosh Sen and others .. *Respondents.*

Limitation Act (IX of 1908), Art 48—Applicability—Conversion not dishonest—Applicability to case of—Statute—Interpretation—Punctuation if a guide to—Lessee—Deed executed by—Assignment of his rights and interests in lease or sub-lease—Construction of deed—Lessee—Joint tortfeasor with his sub-lessee—Liability to lessor as—Conditions—Evidence required.

"Conversion" in Art. 48 of the Limitation Act, cannot be split up into two classes, one dishonest and the other not dishonest; the article is not restricted to cases of dishonest conversion but applies to all cases of conversion, including simple conversion. "Conversion,". a well-known legal term for a particular class of tort, is referred to in the article as one of the modes by which specific moveable property may be wrongfully acquired, the others being theft and dishonest misappropriation. The article should be construed as if it ran as "lost or acquired by theft or by dishonest misappropriation or by conversion."

View of Das, J., in *Lodna Colliery Co., Ltd. v. Bepin Behary Bose,* (1920) 55 I.C. 113 approved.

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*P.C. Appeal No. 30 of 1927. 14th December, 1928.
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Held, that Art 48 applied to a suit for damages for conversion by the defendant of coal wrongfully gotten from the plaintiff's mines and sold or otherwise disposed of by the defendant to his own use, though the defendant had, in doing so, acted under the honest belief that he had obtained or would obtain sufficient authority for what he did.

In construing a statute a Court of Law is bound to read it without the commas inserted in the print.

Held, that, on the true construction of a deed (dated 3rd September, 1917) executed by the appellant (lessee), that it was an assignment of his rights and interests in his lease and that it was not a mere under-lease.

Mining rights in a coal area acquired by *P,* a lessee, were by him assigned to *B,* who in his turn assigned them to *D* In a suit brought by the original lessor seeking to make *P* jointly liable with *B* and *D,* respectively, for their (*B's* and *D's*) wrongful working of the mines, *held,* that *P's* liability really depended upon the question whether he was a joint tortfeasor with *B* and *D* respectively, and that neither the fact that he was their lessor in the proper sense of the term—nor that he "encouraged" the wrongdoers, whatever this might mean, would be sufficient by itself to support a finding that he was a joint tortfeasor.

Appeal No. 30 of 1927 from a judgment and decree, dated the 22nd December, 1925 of the High Court, Patna (Adami and Kulwant Sahay, JJ.), which varied a judgment and decree, dated the 26th November, 1921, of the Subordinate Judge of Purnulia.

The facts of the case, for the purposes of the present report, appear sufficiently from their Lordships' judgment.

De Gruyther, K.C. and *F.E. Farrer* for appellant.

Lowndes, K.C. and *Wallach* for respondents.

[*De Gruyther, K.C.*—Art. 48 of the Indian Limitation Act does not apply. On its true construction, the word "dishonest" governs "conversion" as well as "misappropriation." The Courts have found concurrently that there was no dishonest conversion. The punctuations in Art. 48 support my contention. The suit falls within either Art. 39 or 49 of the Limitation Act, and is in any case barred by limitation. The decision in *Lodna Colliery Co., Ltd.* v. *Bepin Behary Bose*[1] is not correct.

The appellant Pugh is not liable in damages. He was not a joint tortfeasor. *Doe* v. *Harlow*[2] is inapplicable to the facts of the present case. This case is covered by the dictum in *Thomas* v. *Atherton.*[3] Although the defendant Pugh received the royalties, they were all paid in one sum. There is no evidence that he knew that part was paid in respect of the coal improperly taken.

1. (1920) 55 I.C. 113.
2. (1838) 12 Ad. & E 40 113 E.R. 724
3. (1878) L.R. 10 Ch. D. 185.

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Lowndes, K.C.—Considerations of the various Articles in the Indian Limitation Act show that the word "dishonest" in Art. 48 does not qualify "conversion." In an Act of Parliament there are no such things as stops or commas: see *Duke of Devonshire* v. *O'Connor*[4] per Lord Esher, M. R.

On the facts, we submit that the defendant Pugh was a joint tortfeasor. The case is governed by *Powell* v. *Aiken.*[5] We concede that the decision in *Doe* v. *Harlow*[3] is inapplicable. There was a privity amounting to participation in the wrong-doing. The observation in *Thomas* v. *Atherton*[3] was purely *obiter.*]*

14th Dec. 1928. Their Lordships' judgment was delivered by

Lord
Warrington
of Clyffe

LORD WARRINGTON OF CLYFFE.—The action in which the present appeal arises was, so far as is material to the appeal, an action of trover, the plaintiffs claiming damages for the conversion by the defendants of specific movable property, *viz.*, coal wrongfully gotten from the plaintiffs' mines and sold or otherwise disposed of by the defendants to their own use.

The appeal is by one defendant only—the defendant Pugh—and he raises two points of law: (1) that the claim in respect of his own personal working is barred by the Statute of Limitations, and (2) that, as to workings by his lessees, he has wrongly been held to be jointly liable with them, whereas in this respect the plaintiffs' suit ought to have been dismissed as against him.

The plaintiffs' claim alleged fraud as against all the defendants, but this issue was found against the plaintiffs by the Trial Judge, and this finding is not questioned now.

On the first of the two points of law referred to above, the Trial Judge decided against the defendant Pugh, holding that the case fell within Art. 48 in the First Schedule to the Indian Limitation Act, 1908, and accordingly the period of limitation began to run not from the time when the property in question was wrongly taken, but from the time when the plaintiffs first

2 (1838) 12 Ad. & E 40: 113 E R. 724.
3. (1878) L.R 10 Ch D. 185
4 (1890) L.R. 24 Q.B D. 468 at 478
5. (1858) 4 K & J 343: 70 E.R 143

*[I am indebted for the note of arguments in this case to my learned colleague, Mr. H. M. Talbot—*K.J.R*]

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learnt in whose possession the property was. This point was not raised in the appeal to the High Court, but no objection was taken to its being raised before the Board.

The second of the two points was decided against the appellant by both the Courts in India. There were two concurrent findings, but the appellant contends that such findings were wrong in law, inasmuch as the learned Judges misdirected themselves, and there was in truth no evidence which would justify their findings.

The plaintiffs have in the suit established as against the defendants their right to the coal in an area called by various names, but referred to in the appellant's case and in this judgment as Gaurigram, under a mining *pattah*, dated the 3rd April, 1914, granted by the Rajah.

The appellant, under a purchase deed, dated the 5th February, 1915, acquired from a company called the Kohinoor Coal Company, Ltd., its liquidators and mortgagees, certain mining rights granted by the Rajah in 1908 in an area called Pathargarda, adjoining part of the western boundary of Gaurigram, together with the benefit, if any, of a *sannad* of the 16th September, 1913, therein mentioned, and to be referred to presently.

By an indenture, dated the 3rd September, 1917, the appellant granted, demised and leased to the defendant Bagchi such right, title and interest as he had in (amongst other places) Pathargarda, together with the benefit of and rights under the above-mentioned *sannad* of the 16th September, 1913.

By an indenture, dated the 3rd September, 1919, the interest of Bagchi in Pathargarda was assigned by him to the defendants, Pilcher & Co., Ltd.

To return now to the *sannad* of the 16th September, 1913, and the story connected with it. By that document the Rajah for value promised to grant to the Kohinoor Company above-mentioned settlement of 20 *bighas* of coal within Gaurigram within four months of its date and that the Company should have a lease similar to its Pathargarda lease. The *sannad* contained the following condition:—

"If the mining lease is not executed and registered within the said four months you shall not be competent to make any claim for obtaining this settlement I shall be competent to settle the said land with any one else according to my sweet will."

This condition was not performed by the Kohinoor Company.

The plaintiffs at the date of the mining *pattah* of the 3rd April, 1914, had no notice of the *sannad* of the 16th September, 1913.

The conveyance of the 5th February, 1915, to the appellants of the mining rights in Parthargarda recited the *sannad* with the condition above referred to, and stated that no lease had ever been executed in accordance therewith, but, as above mentioned, included in the property and rights conveyed "the benefit, if any, of the *sannad*."

The appellant on taking possession under his conveyance found that the Kohinoor Company had extended its workings into Gaurigram. Having no notice of the grant to the plaintiffs or their predecessors of the grant of the 3rd April, 1914, he immediately approached the Rajah for the purpose of obtaining from him, if possible, an extension of the *sannad*. He believed that he had obtained a promise to this effect, and in this belief and still without notice of the plaintiffs' rights, continued the workings under the 20 *bighas* referred to in the *sannad*. It was not until the 23rd June, 1919, that the appellant heard of the grant of the 3rd April, 1914, and then realised that a lease of the mining rights within the 20 *bighas* in Gaurigram could not be obtained. By this time, as mentioned above, he had parted with his interest in Pathargarda by the grant of the 3rd September, 1917, to Bagchi.

The appellant's workings in Gaurigram ceased in January, 1917. The suit was begun on the 26th June, 1920.

On the question whether the Courts in India were right in holding that the appellant was jointly liable with Bagchi and Pilcher & Co., Ltd., respectively, for their workings in Gaurigram, it is necessary to mention a few further facts.

The deed of the 3rd September, 1917, was, in their Lordships' opinion, an assignment of the appellant's rights and interests under his conveyance of the 5th February, 1915, and not a mere under-lease. It is true that the appellant is therein described as "lessor" and Bagchi as "lessee," but the grant is of the whole of his interest. No sub-term is created and therefore no reversion expectant on a sub-term.

To this deed was annexed a copy of the deed of the 3rd February, 1915, which showed clearly that the rights under the *sannad* had expired. The deed reserved to the appellant royalties in respect of coal "raised from the demised premises." It contained a covenant by the appellant to keep the lessee, his estate and effects indemnified against, amongst other things,

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the encroachments (if any) already committed or made by the appellant in working the collieries, and a further covenant that he would use his best efforts to obtain from the Maharaja a lease of the additional 20 *bighas* adjoining Pathargarda.

Royalties have been received by the appellant under the last-mentioned deed in respect of coal raised from the colliery generally without distinction as to the particular portion from which such coal was raised.

Their Lordships now proceed to consider the two points raised by this appeal.

First, was the action against the appellant in respect of his own workings barred by the Indian Limitation Act, 1908? It is agreed that, if Art. 48 applies to the case, the action is not so barred.

The action was clearly one of trover, and the damages awarded were damages for conversion of specific movable property, *viz.,* the coal when separated from the land, the conversion consisting in the fact that the appellant converted such coal to his own use by selling or otherwise disposing of it. The Courts in India have held that he acted in the honest belief that he had obtained or would obtain sufficient authority for what he did. The conversion, therefore, was not dishonest.

The Schedule to the Act contains two material articles:—

"*Description of Suit.*

"*Art.* 48.—For specific movable property lost or acquired by theft or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the same."

"*Art* 49.—For other specific movable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same In each case the period of limitation is three years"

Under Art. 48 the time from which the period begins to run is "when the person having the right to the possession of the property first learns in whose possession it is," and under Art. 49 "when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful."

In their Lordships' opinion the decision of the Trial Judge in this case is correct, and Art. 48 is the Article that applies. The two Articles are the only ones that apply to claims in respect of specific movable property. Art. 48 alone refers to conversion, and their Lordships can see no ground for splitting up conversion into two classes, one dishonest and the other not dishonest. If such were the intention one would have expected to find such a distinction between different classes of the same

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tort made clear by the express inclusion in Art. 49 of the second of the two classes. The truth is that, if the Article is read without the commas inserted in the print, as a Court of Law is bound to do, the meaning is reasonably clear. "Conversion," a well-known legal term for a particular class of tort, is referred to as one of the modes by which specific movable property may be wrongfully acquired, the others being theft and dishonest misappropriation. The opposite view involves giving a different effect to "or" preceding conversion to that which it has before "dishonest misappropriation." In fact, in each case it is equivalent to "or by."

If this view is not correct, then there is no reference to what one may call simple conversion except by general words. On this point their Lordships agree with the careful judgment of Das, J., in the *Lodna case*.[1] At p. 133 he says:

> "Art. 48 deals only with specific movable property which falls under one of two classes, *viz*, (1) such property as has been lost, or (2) as has been acquired by (*a*) theft, (*b*) dishonest misappropriation, or (*c*) conversion. No other kind of moveable property is affected by this Article."

It is true, he goes on to say, that in his opinion the defendant's conduct was equivalent to theft, but he adds a passage which shows clearly that he would have come to the same conclusion in a case of simple conversion, p. 134:—

> "The plaintiff's complaint is that the defendant has without authority taken possession of the coal belonging to the plaintiff with the intention of asserting some right or dominion over them. The plaintiff company is therefore charging him with conversion. . . It will be noticed that the word 'conversion' is used by the Legislature in Art. 48; it finds no place in Art. 49 It must be presumed that when the Legislature has deliberately used a term which has a known legal significance in law it has attached to that term that known legal significance."

Foster, J., stated that on legal points he agreed fully with the judgment of Das, J.

Their Lordships have not been referred to any other Indian case which deals with the precise question. They are of the same opinion as that expressed by Das, J., and the appeal on this point therefore fails and ought to be dismissed.

Secondly, as to the question whether the appellant can be made jointly liable for the acts of Bagchi and Pilcher & Co., Ltd., respectively.

1 (1920) 55 I.C. 113.

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The Trial Judge so held on the ground that his position as lessor would render him liable, and cited *Doe* v. *Harlow*[2] as his authority. In the High Court, Adami, J., did not dissent from this view, but added that in his view there were facts which established an encouragement of the wrongdoers on the part of the appellant and that this fact was sufficient to render him liable for their acts.

In their Lordships' opinion the learned Judges in both Courts have misapprehended the question they had to try, *viz*., whether the appellant was a joint tortfeasor with Bagchi and Pilcher & Co., Ltd., respectively. Neither the fact that he was their lessor—assuming, contrary to their Lordships' view, that he was a lessor in the proper sense of the term—nor that he "encouraged" the wrongdoers, whatever this may mean, would be sufficient by itself to support a finding that he was a joint tortfeasor.

Doe v. *Harlow*[2] is certainly no authority for the view expressed in the Courts below. It established no principle at all. The question there was whether there was some evidence against one of two persons charged as tortfeasor with having wrongfully kept the plaintiff out of possession of certain premises. The one in question was Warren; he had let the premises to Harlow, who held over after the cesser of Warren's term. The plaintiffs demanded possession from them both, and both refused. The Lord Chief Justice held that there was some evidence against Warren, and he left it to the jury to say on the case against all how long the three had been jointly keeping out the rightful proprietors. On a motion for a new trial on the ground of misdirection the Lord Chief Justice, in the course of argument, says: "Warren encouraged Harlow to remain and received rent from him." As encouragement he is apparently referring to his joining with Harlow in refusing to give up possession for there is no other fact mentioned in the Report which could be regarded as encouragement. He says in conclusion, " If there had been no evidence here but that the under-tenant remained in possession I should have left the case differently."

The fact is *Doe* v. *Harlow*[2] settles no principle at all. The Court merely held that there was evidence on which a jury might properly find that Warren had made himself a party to the tort.

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2. (1838) 12 Ad. & E. 40; 113 E.R. 724.

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Their Lordships are of opinion in the present case that there is no such evidence, and on this point the appeal ought to be allowed and the decree of the Subordinate Judge varied by striking out the words "and 3" from the direction for payment of Rs. 10,350 with proportionate costs and from the direction for payment of Rs. 3,900 with proportionate costs. The appeal substantially succeeds, inasmuch as the point as to the statute involves a comparatively small sum of money and can hardly have caused a material increase of costs.

In their Lordships' opinion, therefore, the appellant should have the costs of the appeal and proportionate costs both in the Subordinate Court and in the High Court attributable to the items on which he has succeeded. They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Pugh & Co.*

Solicitors for respondents: *Watkins & Hunter.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

The Municipal Council, Digdigul .. *Appellant** (*Deft.*)

v.

The Bombay Company, Ltd., Madras. .. *Respondents* (*Plffs.*).

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Madras District Municipalities Act (V of 1920), S. 92—"Transact business"—Meaning of—Limited Company transacting business within Municipality—Evidence required to support finding of—S. 350 of Act—Applicability—Tax paid under protest—Recovery from Municipal Council of—Suit for—Limitation—Payment under protest—Meaning of.

The respondent Company was a Company incorporated under the Indian Companies Act and carried on business in Madras. The effective management of its business, its administration and control were vested in Madras. It employed an agent in Dindigul, but the only business which the Company did for itself through that agent was to buy cotton and ground-nuts for a certain price The agent had, however, no power to conclude any contract, and, unless the offers quoted by him were accepted by the respondent Company in Madras, he had no authority to make a purchase. The respondent Company was, however, also the Managing Agent of another Company, namely the Tinnevelly Company, which did carry on business in Dindigul and elsewhere through the agency of the respondent Company. In Dindigul that business was pressing and ginning cotton and decorticating ground-nuts. There were no Directors of the Tinnevelly Company, and the whole of its affairs and business were conducted by the respondent Company as its Managing Agents, and in respect of the help rendered by it to the Tinnevelly Company, the respondent Company received a profit for itself in the shape of its remuneration The salaries of the persons lent by the

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*O.S.A. No. 6 of 1928. 18th April, 1928.

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respondent Company to the Tinnevelly Company were in every case ultimately paid by the latter Company, though the former made themselves responsible for the amount in the first instance. The whole of the accounts of the respondent Company as managing agents were kept and adjusted in Madras, and there the remuneration by way of commission for managing the Tinnevelly Company was paid.

Held, on the above facts, that the respondent Company did not, in its own behalf or as managing agents for the Tinnevelly Company, transact, *i.e.,* carry on, business in Dindigul, and was not liable to be taxed by the Dindigul Municipal Council under section 92 of the Madras District Municipalities Act of 1920.

Section 92 of the new Madras District Municipalities Act of 1920 has not altered the law as it stood at the date of the *Clan Line case* [(1917) 34 M.L.J. 145], though it was, undoubtedly, intended to do so.

"Transacting business" in S. 92 of the new Act means no more than the phrase "carrying on business."

Per The Chief Justice—If a Company does carry on business in a Municipality, the fact that it does so by an agent who has no power to make binding contracts is no longer one of the tests to be applied.

Per Madhavan Nair, J.—The question whether a Company transacts business within a Municipality for profit is ultimately a question of fact depending upon the evidence in each case. What has to be found out mainly from the evidence is as to where the contracts relating to the business of the Company are habitually made. The mere employment of an agent to do some work for the Company within the Municipality will not make the Company liable to pay the tax so long as the effective management of the business, its administration and control are vested elsewhere.

Held further, that the suit of the respondent Company, in so far as it prayed for a return of moneys that they had paid under protest to the Municipal Council more than six months before the action was brought, was not barred under S. 350 of the Municipalities Act of 1920, not being, in respect to that relief, a suit for damages or compensation within the meaning of the section.

Payment under protest—Meaning and effect of, explained by the Chief Justice.

Appeal from the judgment of the Hon'ble Mr. Justice Beasley, dated 14th November 1927, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 257 of 1927.

Following is the judgment of Beasley, J.:—

JUDGMENT.—The defendant, the Municipal Council of Dindigul, purporting to act under section 92 of the Madras District Municipalities Act, 1920, and R. 16 of Sch. IV to that Act has assessed the plaintiff Company to Companies' Tax for the half years ending the 30th September, 1922, 31st March, 1923, 30th September, 1923 and each of the half years of 1924 in the sum of Rs. 250 in respect of each half year. Under protest the plaintiff Company paid this tax and has now filed this suit to

recover the sums so paid which amount to Rs. 1,500. The plaintiff's contention is that it does not transact business in Dindigul.

Before dealing with the facts of this case and the legal arguments, I will refer to the section and the rule of the Madras District Municipalities Act, 1920, under which the plaintiff Company has been assessed by the defendant. Section 92 is headed "Tax on Companies" and reads as follows:

> "If the Chairman publishes a notification under section 80 that a companies' tax shall be levied, every company transacting business within the Municipality for profit or as a benefit society, shall after the date specified in the said notification pay a half-yearly tax on its paid-up capital on the scale shown in Sch. IV, if and as soon as it has transacted business in the Municipality for the period laid down in section 95"

The Explanation reads as follows:

> "Whenever a company employs a servant or agent to represent it for the purpose of transacting business in a Municipality, such Company shall be deemed to transact business within the Municipality and such servant or agent shall be liable for the tax in respect of the Company's business whether or not he has power to make binding contracts on behalf of the Company."

I will next refer to Schedule IV, Rule 16 which sets out the scale upon which the Companies are to be assessed. Therein Companies are to be assessed upon their paid-up capital. Scale A deals with Companies with a paid-up capital of more than ten lakhs. Those Companies are to be assessed to a half-yearly tax of Rs. 250 and that is the tax levied upon the plaintiff Company. There is a proviso that

> "any Company, the Head Office or a branch or principal office of which is not in the Municipality and which shows that its gross income received in or from the Municipality has not in the year immediately preceding the year of taxation exceeded"—

then follows a scale.

I will now deal with the facts as they came out in evidence which are somewhat different to those set out in the plaint, because in the plaint it is merely stated that the plaintiff Company through an agent in Dindigul only purchases produce, *i.e.*, cotton and ground-nuts there and that the contracts with reference to the purchase of this produce are only concluded in Madras and that produce is sold abroad. If these had been the only facts, this matter would have presented much less difficulty than it does, but it is complicated by the fact that the plaintiff Company is also the Managing Agent of another Company, namely the Tinnevelly Cotton Press Co., Ltd., a Company which undoubtedly does carry on business in Dindigul and elsewhere through the agency of the plaintiff Company. In Dindigul that business is pressing and ginning cotton and decorticating ground-nuts. There are no

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Directors of the Tinnevelly Cotton Press Co., and the whole of its affairs and business are conducted by the plaintiff Company as its Managing Agents whose remuneration is at the rate of four annas for every 300 lbs. weight of cotton or the material pressed or baled by the Company. The powers of the Managing Agents are very wide indeed. This is apparent from the Memorandum and Articles of Association of the Company, clause 80 and onwards. At Dindigul there is a ginning and pressing and decorticating plant owned by the Tinnevelly Company and the staff working that plant is paid in the first place by the Managing Agents who debit the Company with those payments. The property tax in respect of the premises in which the machinery is, is paid by the plaintiff Company and the Tinnevelly Cotton Press Co. is debited with that payment. In every respect any payment made in order to gin, press and decorticate the raw material is eventually paid by the Tinnevelly Cotton Press Co. The license to use the machinery is in the name of the plaintiff Company. That is necessary because the plaintiff Company in its capacity of Managing Agents has to manage and control the plant and the plaintiff Company is also stated to be the owner of the premises in the property tax, etc., demand register. In fact, it is not the owner but only the Managing Agent for the owner. The only persons in Dindigul who are in the pay of the plaintiff Company are those persons necessary for the plaintiff Company to carry on its managing agency possibly to buy raw cotton and ground-nuts. This therefore is not the case of a Company doing acts for itself alone through an agent but is the case of a Company through an agent doing acts in its capacity of Managing Agent for another Company in respect of which it receives a profit for itself in the shape of its remuneration. What the plaintiff Company does for itself through its agent in Dindigul is to buy cotton and ground-nuts for a certain price. This price, Mr. Hearson, the Managing Director of the plaintiff Company in Madras has explained, is fixed having regard to the cost to be incurred in ginning, pressing and decorticating the cotton or the ground-nuts as the case may be. The ginning, pressing and decorticating is done by the Tinnevelly Cotton Press Co. through its Managing Agent the plaintiff Company. The Tinnevelly Cotton Press Co. is for this service paid by the plaintiff Company and in fixing the price paid by the plaintiff Company to the seller of the raw cotton and ground-nuts what is paid to be paid by the plaintiff Company for the process of ginning, pressing and decorticating is allowed for, in the price, that is to say, take for example that Rs. 10 per bale is paid for ginning and pressing the cotton the price paid to the seller is Rs. 10 less than it would have been, had the ginning and pressing been done at the expense of the seller paid out by the seller. The plaintiff's agent in Dindigul has no power to conclude any

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contract to purchase the raw produce. All he is empowered to do is to take his orders from the plaintiff Company in Madras as to the price at which he is to purchase. Sometimes he may quote offers for prices, but unless those offers are accepted by the plaintiff Company in Madras he has no authority to make a purchase. Apart therefore from its business of Managing Agent of the Tinnevelly Cotton Press Co., and its acts done in connection with that business, all that the plaintiff Company *qua*-trading Company does in Dindigul is to buy produce, and clearly on the authorities put before me, that business must be held to be transacted in Madras.

I have been referred to a number of cases dealing with this point and of these the most important is *Grainger & Son* v. *Gough*[1] a decision of the House of Lords. In that case a foreign merchant, who canvassed through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, was held not to exercise a trade in the United Kingdom within the meaning of the Income-tax Acts, so long as all contracts for the sale of all deliveries of the merchandise to customers were made in a foreign country. The foreign merchant in that case was a well-known champagne shipper in France whose chief place of business was in France and who shipped large quantities of champagne to England. The appellants were agents of the foreign merchant. They received orders in the name of the foreign merchant and transmitted them to him in France where he exercised his discretion as to executing these orders. It was sought to assess the appellant to income-tax on the ground that he was exercising a trade in the United Kingdom within the meaning of the Income-tax Acts. On page 333 Lord Herschell in his judgment states:

"Taking the findings together, I think it clear that no contracts to sell wine were ever made by the appellants on behalf of Rœderer. All that they did was to transmit to him the orders received, and until he had agreed to comply or complied with them there was no contract."

On page 336 Lord Herschell states:

"Something more must be necessary in order to constitute the exercise of a trade within this country. How does a wine merchant exercise his trade? I take it, by making or buying wine and selling it again, with a view to profit. If all that a merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country."

This is a very strong case in favour of the plaintiff. In *Lovell and Christmas, Ltd.* v. *Commissioners of Taxes*[2], a decision of the Privy Council on appeal from New Zealand, it was held that where the appellants' profits consisted of a commission deducted by them from moneys received in London under agency contracts of sales effected in London of goods bought from New Zealand as a result of transaction made by them in that Colony, that the profits were

1. (1896) A.C. 325. 2. (1908) A.C. 46.

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actually made in London, and that the earlier transactions in New Zealand were insufficient to render those profits taxable under the New Zealand Land and Income Assessment Act as profits derived from business carried on in that Colony. Sir Arthur Wilson, in delivering the judgment of the Privy Council on page 51 after dealing with the decided cases states as follows:

"One rule is easily deducible from the decided cases The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income-tax Acts, so as to render the profits liable to income-tax."

In *Hajee Shaik Meera Rowther* v. *The President of the Corporation of Madras*,[3] which was a decision under the City Municipal Act (Madras), III of 1904, the Court had to consider what the words "exercising a trade" meant and it was held that where a person has a servant at a certain place who purchases piece-goods there and forwards them to another place where they are sold and the profits are earned, such person exercises his trade within the meaning of section 120 of the Madras City Municipal Act at the place where the piece-goods are sold and not at the place where they are purchased. In this case the Court followed the principle laid down in *Lovell and Christmas, Ltd.* v. *Commissioners of Taxes*,[2] already referred to, amongst other cases. In *Municipal Council of Cocanada* v. *The "Clan" Line Steamers, Ltd.*,[4] which was a decision under the District Municipalities Act of 1884, a shipping Company, which earned profits by carriage of goods by sea and in the course of its business called at several ports of the various parts of the world, was in the habit of loading and unloading goods at Cocanada, and it appeared that the Company had its principal agent at Madras who employed a sub-agent at Cocanada, but that all the contracts with shippers could be and were entered into only by the agent at Madras, and the Company was assessed by the Municipality of Cocanada to pay tax under the District Municipalities Act for exercising its trade and carrying on its business in Cocanada and it was held that the Company was not exercising any trade or carrying on business in Cocanada so as to be liable to be taxed under that Act because the freight-earning contracts with the shippers were not entered into at the port of Cocanada. In this case *Grainger & Son* v. *Gough*[1] and *Lovell and Christmas, Ltd.* v. *Commissioners of Taxes*[2] were followed. In *The Board of Revenue* v. *The Madras Export Company*[5] an agent of a firm situated in Paris bought raw skins in Madras and exported them to Paris where the Firm sold them for profit and it was

1. (1896) A.C. 325. 2. (1908) A.C. 46.
3. (1909) I.L.R. 33 M. 82. 4. (1918) I.L.R. 42 M. 455: 36 M.L.J. 226.
5. (1922) I.L.R. 46 M. 360: 44 M.L.J. 290.

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held that as the profits accrued solely in France they were not taxable in British India. Of these cases some were cases decided upon the construction of Income-tax Acts and two of the Indian cases were decisions upon acts entitling a Municipality to exact a tax on professions or trades.

But although the case I have before me now is not one which arises under an Income-tax Act, the decisions to which I have been referred under the Income-tax Acts are of the very greatest importance in determining the question as to whether the plaintiff Company are transacting business for profit in Dindigul and indeed the Madras High Court in those cases referred to above in considering the construction of words very similar to the Municipal Act was guided by the construction placed on the words of Income-tax Acts by the House of Lords and the Privy Council and I think that whether the words are "carrying on business," exercising a trade for profit or transacting business those words must be used in the same sense and have the same meaning. But it is contended by the defendant that these cases have no application to the present case because the companies' tax is not in any sense an income-tax but is a license to transact business without which no Company can trade at all within a Municipality and reference was made to the *Commissioner of Income-tax* v. *Nedungadi Bank*[6] in which it was held that a tax on Companies levied under section 92 of the Madras District Municipalities Act, 1920, the Act under which the plaintiff Company in this case had been assessed, should be deducted as a business allowance under section 10 (2) of the Income-tax Act in assessing income under the latter Act and that the tax on Companies levied under the Madras District Municipalities Act, 1920, is not an income or profession-tax but is a compulsory toll on trading companies without which they are not permitted to carry on their trade and the payment of which is an expenditure incurred solely for the purpose of earning profits or gains. In my view this case in no way affects the real question which is whether the plaintiff Company are according to legal definition transacting business for profit in Dindigul. What it decides is that if a Company is assessable to companies' tax the Company is entitled to deduct what it has paid in respect of tax in assessing its income under the Income-tax Act as an expenditure incurred solely for the purpose of earning profits or gains. I am clearly of the opinion in view of the authorities already referred to that where the Company merely buys goods in another place through an agent and where the contract for purchase of those goods is only concluded elsewhere the Company is not in the place where the goods are bought transacting business in the sense that those words are used in the Madras District Municipalities Act, 1920. But it is contended alternatively

6. (1924) I.L.R. 47 M. 667: 47 M.L.J. 160 (S.B).

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by the defendant that the plaintiff Company does carry on a business in Dindigul, namely, that of Managing Agent of Tinnevelly Cotton Press Co., Ltd., for which it is remunerated and therefore liable to tax under Rule 16 of Sch. IV of the Act or under its proviso. It is conceded on behalf of the plaintiff Company that a part of the profit earned by it in respect of the management of the Tinnevelly Company's business is the remuneration of four annas per 300 (lbs.) bale of cotton pressed at Dindigul. But the question still is, is that earned in Dindigul or is it the result of the management of the Tinnevelly Cotton Press Co., Ltd., by the plaintiff Company in Madras where all the operations in the Madras Presidency of the Tinnevelly Cotton Press Co. are controlled in such a way as to make the place where the plaintiff Company trades Madras and not Dindigul. Facts very similar have been dealt with by the House of Lords in *San Paulo (Brasilian) Railway Co.* v. *Carter.*[7] In that case it was held that where a trade is carried on either wholly in the United Kingdom or partly within and partly outside it and profits accrue therefrom to a person or a Corporation residing in the United Kingdom, the tax to be levied is to be computed on full amount of the balance of the profits or gains of the trade and not only upon the actual sums annually received in the United Kingdom. Lord Halsbury in his judgment on page 38 after stating that it is probably a question of fact where the trade is carried on and that it may be true to say that the phrase may be understood in two different senses, says that it may be the locality of the goods or the land which are the subjects of the trade or it may be the place in which the conduct and management, the head and brain of the trading adventure, are situated, and proceeds to examine the facts of the case under appeal with regard to these principles and states:

> "If it were a mine, as in the *Cesena case,*[8] or a jute mill, equally with a railway, the person who governs the whole commercial adventure, the person who decides what shall be done in respect of the adventure, what capital shall be invested in the adventure, on what terms the adventure shall be carried on, in short, the person who, in the strictest sense, makes the profits by his skill or industry, however distant may be the field of his adventure, is the person who is trading. That person appears to me, in this case, to be the appellant Company. Every one of the tests I have applied are applicable to its proceedings. A ship-owner, or indeed a ship-broker, may not have any one of the ships or the charterparties which he negotiates in England, but by correspondence or by agency he may have both charterparties and ships, not necessarily British ships, all over the globe But if he lives in London, and by his direction governs the whole of this commercial adventure, could it be properly said that he is not carrying on his trade in London?"

In this case, if those tests laid down by Lord Halsbury are applied, I think it is clear that it must be held that although certain

7. (1896) A.C. 31. 8 (1875) 1 Ex. D 428

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profits are earned in Dindigul for the plaintiff Company the business is controlled from Madras and that is where the profits must be held to be earned, that is where the plaintiff Company's business is being carried on and it is there that the plaintiff Company is to be assessed in respect of its profits if at all. Another important case upon this point is *Smidth & Co.* v. *Greenwood.*[9] In that case the appellants were a Danish Firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery which they exported all over the world. They had an office in London in charge of a qualified engineer who was their whole-time servant. He received enquiries for machinery such as the appellants could supply, sent to Denmark particulars of the work which the machinery was required to do, including samples of materials to be dealt with, and when the machinery was supplied he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the appellants and their customers were made in Copenhagen and the goods were shipped F.O.B. Copenhagen. The Commissioners held that the appellants exercised their trade within the United Kingdom and were assessable to income-tax. It was held by Rowlatt, J., that the place where a trade was exercised was the place where the transactions forming the alleged business were closed, in the case of a selling business by the sale of commodity and the profit, thereby realised, and that therefore the appellants exercised their trade in Denmark, and that they could not in respect of the same profits and gains exercise their trade elsewhere. On page 286 Rowlatt, J., said:

> "Trading is buying or making and selling, and if I am right in supposing that one single place has to be treated as the place where the trade is exercised it seems to me that it must be where the profit-bearing transactions are closed."

This case possibly has a more important bearing on the earlier part of the case than it has on this part. In the former cases referred to on this point it is true that those were decisions under the Income-tax Act, whereas this is a case not of a tax upon income because in *Commissioner of Income-tax* v. *Nedungadi Bank*[6] the companies' tax was held not to be so. But whatever its nature the tax can only be imposed upon a Company transacting business for profit within the limits of the Municipality. "Transacting business for profit" are the words of section 92 of the Act and both Rule 16 and its proviso must be subject to those words in section 92. In my view "transacting business for profit" is carrying on a trade. I can see no distinction and I therefore hold that the plaintiff Company was transacting its own business and that of Managing Agent for the Tinnevelly Cotton Press Co. in Madras and that its profits were earned in Madras and that it is liable to be assessed in Madras and not in Dindigul.

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6 (1924) I.L.R. 47 M. 667· 47 M.L.J. 160 (S.B.).
9. (1920) 3 K.B.D. 275.

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There are two further points raised by the defendant. The first is that the suit is barred by limitation and the other is that the suit is not maintainable. But section 350 deals with suits for damages and compensation and in my view this is not such a suit. The claim in this suit is for the return of companies' tax alleged to have been over-paid. That is not a claim for damages, nor is it a claim for compensation and I agree with the view of Waller, J., in C.S. No. 269 of 1923 upon this point.

With regard to the latter point section 354 of the Madras District Municipalities Act, 1920, says that:

> "No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment or collection of money made under the said authority, provided that the provisions of this Act have been in substance and effect complied with."

That section, it is argued by the defendant, renders this suit not maintainable because it is argued that the money collected was collected under the authority of this Act and that the provisions of this Act have been in substance and effect complied with. In *Municipal Council, Cocanada* v. *The Standard Life Assurance Company*[10] where the plaintiff Company brought a suit to recover the amount levied under the Madras District Municipalities Act of 1884 and which they had paid under protest it was contended by the Municipality that the suit was not maintainable because the provisions of that Act had been complied with; it was held that the suit was maintainable as a Company not liable to the tax had been taxed and the provisions of the Act had therefore not in substance and in effect been complied with and that the Municipality was not protected from action. In *Municipal Council of Mangalore* v. *The Codial Bail Press*[11] in which the same objection was taken by the Municipal Council, namely, that by reason of S. 262 (2) of the District Municipalities Act, of 1884 which was a similar section to S. 354 (2) of the present Act, the suit was not maintainable by reason of that section, it was held that the Municipality which had assessed a person on his estimated gross income had wrongly assessed him because the word "income" was net income and consequently the provisions of the Act had been not in substance and effect complied with and that the Court could entertain a suit to recover the amount of tax paid under the assessment. It seems to me that if a Municipality levies a tax upon a person or corporation not liable to pay that tax it cannot be argued that what has been done has been done in compliance either in substance or in effect with the provisions of the Act, and these two cases are direct and binding authority upon this point.

I have now disposed of the points raised in this case. There is only one other matter to which I desire to refer and that is to a

10. (1900) I.L.R. 24 M. 205. 11. (1903) I.L.R. 27 M. 547: 14 M.L.J 410.

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letter written by the plaintiff Company's Agent to the defendant Municipal Council in which he assumes that the Company is liable to be assessed upon its profits. Having regard to what I have already stated this was an incorrect view to take and it cannot be argued that the plaintiff Company is thereby prevented from raising the point that they are not liable to be assessed at all under the Act.

For all these reasons the plaintiff's claim succeeds and there must be a decree for Rs. 1,500 with interest at the Court rate of 6 per cent. per annum from the date of the filing of the plaint and costs.

T. M. Krishnaswami Aiyar for appellant.

Vere Mockett and *R. N. Aingar* for respondents.

The Court delivered the following

JUDGMENTS. *Coutts Trotter, C.J.*—The facts relating to this case are clearly set out in the judgment of the learned Trial Judge and it is unnecessary to repeat them. I considered the whole position as it stood under the Act of 1884 in the case of *Clan Line Steamers, Ltd.* v. *Municipal Council of Cocanada,*[12] in which I reviewed all the authorities. That judgment was confirmed on appeal and I do not propose to go over the same ground again. (Coutts Trotter, C.J.)

The only question I have to consider is whether section 92 of the new Madras District Municipalities Act of 1920 has altered the law as it stood at the date of the *Clan Line case.* In my opinion it has not, though I have no doubt that it was intended to do so. Two parts of the section are called in aid by the Municipality. The first is the body of the section itself which uses the phrase "transacting business" instead of the words of the old Act "exercising . . . . any one . . . . of the trades or callings specified in the schedule." It is quite obvious that if "transacting business" is not to be controlled in some way, it would render liable to the tax any company situate in Madras who made an isolated purchase for the purpose of re-sale or shipment abroad in any one of the Municipalities in the Presidency. No one can suppose that any such construction could reasonably be put upon the words. Stress is also laid upon the explanation to S. 92 which says:

"Whenever a company employs a servant or agent to represent it for the purpose of transacting business in a municipality, such company shall be deemed to transact business within the Municipality and such servant or agent shall be liable for the tax in respect of the company's business whether or not he has power to make binding contracts on behalf of the company."

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12. (1917) 34 M.L.J. 145.

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In my view that carries the matter no further. I feel myself constrained to construe "transacting business" as meaning no more than the phrase "carrying on business" which has been defined by a series of decisions of the highest Courts in England and settled for this Court by the decision in *Clan Line Steamers, Ltd.* v. *Municipal Council of Cocanada.*[12] The English decisions I have reviewed in my judgment in the last named case. It may be quite true that if the Company does carry on business in the Municipality, the fact that it does so by an agent who has no power to make binding contracts is no longer one of the tests to be applied. The question still remains, "does the Company either itself or by its agent transact, *i.e.*, carry on business in the accepted legal meaning of the term 'within the Municipality'?" In my opinion it would be no more reasonable so to hold than to hold that a Company who sends a commercial traveller all over India to make purchases for them can be said to carry on business in all the various places at which he calls to fulfil the purpose of his employment.

An alternative case was put forward, namely, that even if it could not be said that the Bombay Company carried on the business of purchasing cotton and ground-nuts in Dindigul, they still could be said to be carrying on the business of managing agents of the Tinnevelly Cotton Press Company in Dindigul. On the facts it appears to me absolutely plain that the business they undoubtedly carried on as managing agents of the Tinnevelly Cotton Press Company was entirely carried on in Madras and the fact that the Bombay Company lent certain persons to the Tinnevelly Cotton Press Company to help them in their business of ginning and pressing cotton and decorticating groundnuts does not affect the matter. The salaries of the persons so lent are in every case ultimately paid by the Tinnevelly Cotton Press Company and not by the Bombay Company, though the Bombay Company made themselves responsible for the amount in the first instance. In these circumstances, it appears to me impossible to contend that their business as managing agents is carried on anywhere except in Madras where the whole of the accounts are kept and adjusted, and where the remuneration by way of commission for managing the Tinnevelly Cotton Press Company is paid.

The second point in the case raises a question of very considerable interest. The plaintiff Company here sued for a

12. (1917) 34 M.L.J. 145.

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return *inter alia* of moneys that they had paid under protest more than six months before the action was brought, and it is contended that the recovery of such payments is time-barred by reason of section 350 of the Act of 1920. The industry of counsel put before us practically every decided case both English and Indian. I may clear the ground of two points at once. In the first place it cannot be contended, as was at one time suggested, that payment under protest can affect the position of the person who is being paid. Its value is to safeguard the position of the person who makes the payment and to ensure that it cannot be said that the payment he made was a voluntary one; but it does not raise any obligation on the part of the person who accepts the payment to return it if it turns out ultimately that the money was not due. The question whether there is an obligation to return it has to be determined on grounds altogether independent of whether the payment was made with or without protest.

It is clear that actions such as the present are in the nature of English actions for money had and received and we were taken through a long series of authorities as to what the real nature of this action in the English Common Law Courts was, culminating in the judgment of the House of Lords in the well-known case of *Sinclair* v. *Brougham*.[13] The history of the matter will be found in the judgment of Lord Sumner in that case. There, the suggestion was made that it was erroneous to suppose that the cause of action was really in assumpsit which would rest upon an implied or imputed contract to return the money to the person to whom it was proved properly to belong but that Lord Mansfield in *Moses* v. *Macferlan*[14] had rested it on an equitable doctrine independent of assumpsit which made the return of the money obligatory *ex aequo et bono*. That doctrine was demolished by Lord Sumner and it may be regarded as definitely established that in the English Common Law Courts, the cause of action is exclusively founded on an assumpsit or its modern equivalent. It would be a barren display of learning to enquire how far it is true to say that an action in assumpsit in its origin really sounded in tort, for the simple reason that I am quite prepared to concede that if an action for money had and received sounds either in tort or implied contract in this country, it would be within the words of section 350 of Act V of 1920 and that the plaintiff Company would be time-barred; because either form of such an action would

13. (1914) A.C. 398 14. (1760) 2 Burr. 1005: 97 E.R. 676.

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obviously be a suit for damages or compensation within the meaning of the section. These words are peculiar to the Indian Statute. They are not found either in section 21 of the Public Health Act of 1875 or section 1 of the Public Authorities Protection Act of 1893 whose language is very much more general; and I am quite prepared to think that if the draftsman of the Indian Act had reproduced the words of the English Statute and not added the qualification "for damages or compensation," which has caused all the trouble, in this case these arrears could not be recovered. But there are the words which I have to deal with and the question which I have to consider is whether the Courts in India are compelled to regard a suit of this nature as confined within the limits of a suit for money had and received as known to the English Common Law. I find the highest authority for taking the contrary view, the authority of a Privy Council case binding on me, namely, *John* v. *Dodwell and Company*.[15] Lord Haldane there points out, referring to Ceylon,

> "Under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases 'where the defendant has received money which *ex aequo et bono* he ought to refund' If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, inasmuch as every Court can treat the question as one not merely of contract, but of trust fund where necessary, there is no difficulty in extending the remedy to all the cases covered by the words just quoted."

I take that as being equally applicable to the Courts of British India and I take it to mean this—that in Courts such as those in Ceylon and those of British India, an action for money had and received, may be treated, though the English Common Law cannot treat it, as an action founded on an equity binding on the conscience of the recipient of the money which is shown not to be his. If that be right, it follows that the remedy being an equitable one is enforceable because it is binding as *ex aequo et bono* on the conscience of the defendant and cannot possibly be either a suit for damages or compensation. I do not quite understand His Lordship's words "trust fund," but it appears to me reasonably clear that as he is dealing throughout with an action for money had and received, he cannot be supposed to have intended to apply what he said merely to earmarked funds, for such do not arise in the case of actions for money had and received. I consider it broadly as coming to

15. (1918) A.C. 563.

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this, that Lord Haldane considers that for Ceylon and therefore for India, where there has never been any divergence between equitable and legal remedies, it is permissible to apply the suggestion of Lord Mansfield, whether it offends against the Common Law of England or not, to such actions when brought in India. In this view, the suit for the recovery of the payments made outside the limitation period of six months is unaffected by the provisions of section 350 and neither the necessity for the notice nor the limitation of six months contained in that section applies.

I may add that a tax, the amount of which is fixed solely by the paid-up capital of the Company, without reference to the amount of business done in the area of proposed assessment is one whose incidence the Courts should watch with a jealous eye. The Municipalities are to get this tax without incurring any expense of enquiry into, or consequent on, the assessment of the amount of business actually done. The tax no doubt is not heavy and perhaps it suits both sides to avoid the trouble of going into the actual volume of business done in the particular Municipality. But the principle is a dangerous one, and it is not difficult to imagine cases where it would inflict great injustice on the Company to be taxed.

The appeal will be dismissed with costs.

Madhavan Nair, J.

Madhavan Nair, J.—The plaintiff, the Bombay Company, Limited, is a company incorporated under the Indian Companies Act and carries on business in Madras and elsewhere. The defendant, the Municipal Council of Dindigul, is a Corporation constituted under the District Municipalities Act of 1920 and has its office at Dindigul. The defendant Municipality purporting to act under section 22 and Rule 16, Sch. IV of the District Municipalities Act assessed the plaintiff Company to Company's tax for the half-years ending 30th Sept. 1922, 31st March 1923, 30th September, 1923, 31st March, 1924, 30th September, 1924 and 31st March, 1925 in the sum of Rs. 250 in respect of each half-year. Under this section, tax is leviable if the Company has transacted business for profit within the Municipality for a specified period. The plaintiff Company paid this tax under protest and filed the suit to recover the sums so paid which amount to Rs. 1,500. The contention of the plaintiff Company is that it did not transact business in the Municipality and therefore the tax is not leviable; the defendant, on the other hand, contends that the tax is leviable as the Company transacted business in Dindigul and also that the suit is barred under

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section 350, clause (2) of the District Municipalities Act. The learned Judge (Beasley, J.) who heard the case overruled the contentions of the defendant and gave a decree to the plaintiff Company. This appeal is against his judgment and decree.

Two questions for consideration in this appeal are: (1) Whether the defendant is entitled to levy the tax on the plaintiff Company under section 92 of the District Municipalities Act? and (2) Is the suit barred by limitation?

The relevant portion of section 92 of the District Municipalities Act is as follows:

" . . every company transacting business within the Municipality for profit or as a benefit society shall . . . pay a half-yearly tax on its paid-up capital on the scale shown in Sch. IV, if, and as soon as it has transacted business in the Municipality for a period laid down in S 95 "

According to this section, if the plaintiff Company transacted business in the Municipality for the specific period, the tax is leviable by the defendant. The question whether the plaintiff Company transacted business within the Municipality for profit is ultimately a question of fact depending on the evidence in each case. The question in what circumstances a Company or person may be said to carry on or exercise a trade in any locality has been considered in England in various cases mainly under the Income-tax Acts: the principles laid down in these cases will be very helpful in examining the evidence in this case These decisions are so well known that I propose to refer only to a few of them; and further, most of these cases have been very exhaustively, if I may say so with respect, considered in a judgment of this Court in *Clan Line Steamers, Ltd.* v. *Municipal Council of Cocanada.*[12] In *Grainger and Son* v. *Gough*[1] it was held by the House of Lords that a foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income-tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. In that case a wine merchant whose place of business was in France employed Grainger and Son who had an extensive business of their own as wine merchants, as agents for the sale of his wine in the United Kingdom. They sought orders in the name of the foreign merchant and transmitted them to him in France where he exercised his discretion as to executing these orders. It was sought to assess Grainger and Son to income-tax on the ground

1. (1896) A.C. 325.

12 (1917) 34 M.L.J. 145

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that they were exercising a trade in the United Kingdom. The following extract from the judgment of Lord Herschell explains the basis of the judgment:

"Taking the findings together, I think it clear that no contracts to sell wine were ever made by the appellants on behalf of Roederer. All that they did was to transmit to him the orders received, and until he had agreed to comply or complied with them there was no contract . . . An order given to a merchant for the supply of goods does not of itself create any obligation. Until something is done by the person receiving the order which amounts to an acceptance, there is no contract. It is clear that the appellants in receiving an order did not accept or purport to accept it on Roederer's behalf so as to constitute a contract, and that they had no authority so to do."

In another part of the same judgment appears the statement:

"If all that the merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods."

Erichsen v. *Last*[16] is another case where similar principles have been enunciated. In *Lovell and Christmas, Ltd.* v. *Commissioner of Taxes*[2] the following observation appears in the judgment of the Privy Council:

"One rule is easily deducible from the decided cases The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income-tax Acts, so as to render the profits liable to income-tax"

See also *San Paulo (Brasilian) Railway Company* v. *Carter*.[8] All the well-known cases on this point have been discussed, as I have already pointed out, under two heads, the tax cases and the jurisdiction cases in *Clan Line Steamers, Ltd.* v. *Municipal Council of Cocanada*,[12] which is a decision on the District Municipalities Act of 1884. It was held in that case that the shipping company which was sought to be assessed at Cocanada was not exercising any trade in Cocanada so as to be liable to be taxed because the freight-earning contracts entered into by the Company were not entered into at the port of Cocanada.

According to these decisions, provided they are applicable to the circumstances of the case before us, what we have to find out mainly from the evidence is as to where the contracts relating to the business of this company are habitually made. If the contracts are made elsewhere, then the company cannot

2. (1908) A.C 46
8. (1896) A.C. 31.
12. (1917) 37 M.L.J. 145.
16. (1881) 8 Q.B.D. 414.

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be taxed for transacting business in Dindigul. But it is argued by Mr. Krishnaswami Aiyar for the appellant that these tests should not be applied in judging the evidence in this case because they were decided under the English Income-tax Acts and they were concerned with the interpretation of the words "exercising a trade for profit" or "carrying on a trade" and not with the meaning of the term "transacting business" which are the words used in the District Municipalities Act. He also relies on the explanation to section 92 of the Act to show that these decisions are no longer applicable in considering cases arising under the section. In support of his first argument he has referred us to the decision in *Smith* v. *Anderson*[17] and a few other cases to show that the word "business" has a more extensive signification than "trade" and that, if there is evidence to show that some kind of business was done in Dindigul such as buying raw cotton, etc., though the contracts with regard to such purchase are made in Madras, then the Company must be considered to be transacting business in Dindigul and not in Madras. It is difficult to accept this distinction. What we have to see under the Act is whether the company transacts business for profit in Dindigul. The place where the business is transacted is the place where the tax is leviable. Whether the words are "carrying on business" or "exercising a trade" or "transacting business" I think all must be considered to be used in the same sense and therefore the principles deducible from the decisions are equally applicable to the present case. The second argument that these principles are inapplicable because of explanation to section 92 of the District Municipalities Act presents some difficulty. It is obvious that the intention of the legislature in enacting the explanation was to nullify the effect of the decision in *Clan Line Steamers, Limited* v. *Municipal Council of Cocanada*[12] and also generally to exclude the operation of the English cases referred to. But I think the language employed has not succeeded in fully carrying out that intention. According to the explanation, if a company employs a servant for transacting business within the Municipality, such company shall be deemed to transact business within the municipality, and such servant shall be liable for the tax in respect of the company's business, whether or not he has power to make binding contracts. Even so, it is the company that is sought to be made liable for the tax and in order to make it liable for the tax, the agent or servant should be employed for

12. (1917) 34 M.L.J. 145.

17. (1880) 15 Ch D 247.

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the purpose of transacting business within the municipality for profit and so we are thrown back again to the consideration of the question, what is meant by "transacting business." The mere employment of the agent to do some work for the company within the municipality will not, I think, make the company liable to pay the tax so long as the effective management of the business, its administration and control are vested elsewhere; otherwise the mere soliciting of an order by an agent in any particular case will make the company of which he is the representative liable for the company's tax in that case, and this will clearly be against the accepted notions of the commercial community here and elsewhere. In my view the section and its explanation should not be interpreted to lead to this result.

As regards the evidence, there can be no doubt in this case that all the business contracts are concluded at Madras and that the whole business of the company is effectively controlled from there. On the evidence in the case I agree with the conclusion of Beasley, J., that no tax should have been levied on the plaintiff Company by the municipality as it was not transacting any business within the municipality during the period in question. It therefore follows that the sum which the plaintiff seeks to recover from the defendant was collected by the municipality wrongfully under the provisions of the District Municipalities Act.

The next question for consideration is whether the plaintiff's suit is barred by limitation under section 350, clauses (1) and (2) of the District Municipalities Act. If the section applies, the suit for the refund of the tax paid for the first five instalments will clearly be barred, and it will be maintainable only with respect to the last instalment. According to section 350, clause (1)

"No suit for damages or compensation shall be instituted against the municipal council . . in respect of any act done in pursuance or execution or intended execution of this Act or any rule . . . regulation or order made under it or in respect of any alleged neglect or default in the execution of this Act, etc.,"

unless some formalities are complied with and clause (2) of that Act states:

"Every such suit shall be commenced within six months after the date on which the cause of action arose . . ."

It is argued on behalf of the plaintiff Company that the present suit is not one for damages or compensation as mentioned in clause (1) of section 350 and therefore is not barred under clause (2) of that section. The defendant argues contra.

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The question is whether the present suit is one for damages or compensation within the meaning of S. 350, clause (1) of the Act. I may state at once that I have not found the question an easy one to decide and that no decisions directly bearing on the question have been brought to our notice. The section is evidently modelled upon the provisions of section 1 of the Public Authorities Protection Act, 1893, *i.e.,* 56 and 57 Vic. c. 61, but there is one striking difference between the wording of the provisions of the two enactments. In speaking of the proceedings against persons with reference to acts done in execution of satutory or other public duty, section 1 of the English Act refers to "any action, prosecution or other proceeding" and clause (*a*) states that "such action shall not lie or be instituted unless it is commenced within six months next after the act, etc." whereas in speaking of such proceedings section 350, clause (1) uses the expression "suit for damages or compensation." While the English Act gives exemption for all action, prosecution or other proceeding unless commenced within six months next after the act complained against, the Indian enactment confines its operation to "suits for damages or compensation." With the words of the English enactment "any action, prosecution or proceeding" before it, why the Indian Legislature in enacting the District Municipalities Act chose to use the expression "suits for damages or compensation" in section 350, clause (1) of the Act, it is not easy to conjecture. It may be, as contended for by the appellants, that the legislature thought that all actions of the kind that we are dealing with, namely, those brought against public authorities for acts done in execution of their authority might be brought under the description "suits for damages or compensation"; in which case there can be no difference between the English Law and the Indian Law; or it may be, as contended for by the respondent, that the Indian Legislature confined the operation of the section to what are strictly called "suits for damages or compensation" thus deliberately excluding from its scope other kind of suits which do not strictly come within that description. In this connection, it is interesting to note that in speaking of actions which may be brought against the Municipal Council, etc., for acts done in pursuance of or in execution of the Act, section 261 (1) of the old Act (that is, Act IV of 1884) states that "no action shall be brought, etc.," thus bringing within its scope all descriptions of actions as under the English Law.

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Decisions of the English Courts under the Public Authorities Protection Act and section 264 of the Public Health Act which it repealed, *Waterhouse* v. *Keen,*[13] *Selmes* v. *Judge,*[19] *Midland Railway Co.* v. *Withington Local Board,*[20] *Cree* v. *St. Pancras Vestry,*[21] *Lyles* v. *Southend-on-Sea Corporation*[22] and *Bradford Corporation* v. *Myres*[23] were referred to, for showing that actions of the kind we are dealing with in this case are either actions in tort or in contract and therefore should be considered as "suits for damages or compensation." (*See* also paragraph 700 of Halsbury's Laws of England, Vol. 23, page 346). In view of the express language used in the Indian enactment, I do not think a discussion of the question whether an action of this kind would come within the description of the old form of action known to English Law as an action in assumpsit or whether the claim is one in tort will yield much profitable result. It is conceded and it is clear from the English cases referred to above that actions for the recovery of money wrongfully collected by local authorities are actions for money had and received and that, in understanding the nature of such actions, we have to look more to their substance than to their form. Lord Mansfield in the well-known case of *Moses* v. *Macferlan*[14] stated that the action for money had and received is founded on the equity of the plaintiff's case and that the action is an equitable one to recover back the money which ought not in justice to be kept by the defendant. The learned Judge pointed out that the action is maintainable for money which *ex aequo et bono* the defendants are to refund. The money that has been wrongfully collected by the defendant from the plaintiff is to be regarded as a trust fund which the defendant is in equity bound to refund to the plaintiff. This is in substance the essence of the action for money had and received, though it is not clear as to what extent Lord Mansfield intended to import the equitable principles within the dominion of the common law action. *See* Viscount Haldane's comment in *John* v. *Dodwell and Company*[15] on Lord Sumner's view in *Sinclair* v. *Brougham.*[18] However that may be, the Privy Council has, in *John* v. *Dodwell and Company,*[15] a case from Ceylon, pointed out that where law and equity are administered as parts of a single system, actions for money had and received

13 (1914) A C. 398. 14. (1760) 2 Burr. 1005: 97 E.R. 676.
15. (1918) A.C. 563 18. (1825) 4 B. & C. 200: 107 E R. 1033
19 (1871) 6 Q.B. 724. 20. (1883) 11 Q.B.D. 788
21. (1899) 1 Q.B. 693. 22. (1905) 2 K.B. 1.
23. (1916) 1 A.C. 242.

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may be considered as equitable actions; and if so, it must follow that it is not correct to describe them as suits for damages or compensation. There can be no doubt that what has been said with reference to Courts in Ceylon will apply equally to Courts in India as well, inasmuch as in these Courts also, law and equity are administered as parts of a single system. The remarks of Viscount Haldane in *John* v. *Dodwell and Company*[15] relevant to the present question are as follows:

"For under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases 'where the defendant has received money which *ex aequo et bono* he ought to refund.' If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, inasmuch as every Court can treat the question as one not merely of contract, but of trust fund where necessary, there is no difficulty in extending the remedy to all the cases covered by the words just quoted."

In view of these observations it must be held that the plaintiff's suit for recovery of the money wrongfully collected by the defendant cannot be described as a suit for damages or compensation being essentially an equitable action for money had and received, and that therefore the bar of limitation prescribed by section 350, clause (2) of the District Municipalities Act does not apply and the suit is not barred by limitation as regards the refund of any one of the plaint instalments.

I would also add that having regard to the meaning of the words "damages and compensation" and also the relief claimed in the plaint, viz., a refund of the amount of the tax overpaid, it is hardly correct to call the plaintiff's suit one for damages or compensation.

In the result, the appeal is dismissed with costs.

Attorneys for respondents: *King and Partridge.*

A.S.V. *Appeal dismissed.*

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15. (1918) A.C. 563.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Neyna Moona Kavanna Muhammad Moideen and 4 others ... *Appellants** (*Defts.*)

v.

S. K. R. S. K. R. Chinthamani Chettiar and 3 others .. *Respondents* (*Plffs.* 1, 2, 4 *and* 5).

Muhammad Moideen v. Chinthamani Chettiar.

Civil Procedure Code (*V of* 1908), *S.* 13 (*b*)—*Suit in Colombo Court—Joint application by parties to postpone suit for settlement and to enter up decree for plaintiffs if settlement not effected—Defendants' and proctor absent on adjourned date—Settlement not effected—Order of Court to enter decree for plaintiffs—Judgment if one not given on the merits of the case—Assignment by one of the plaintiffs of his share in the decree of the Colombo Court—Assignment not recognised by the Colombo Court—Power of Court in British India to recognise assignment.*

The plaintiffs and the defendants in a suit on the file of the District Court of Colombo filed a joint application, at the time of the trial, to the effect that the trial of the suit may be postponed for three months with a view to settlement and that, if not settled, judgment may be entered for the plaintiffs as prayed for with costs. When the suit was called on the adjourned date after the three months, the defendants and their proctor were absent and, on the plaintiffs' proctor stating that the case had not been settled, the Court ordered that decree in terms of the prior order be entered up. One of the plaintiffs in the suit assigned his share in the decree to the other plaintiffs and the latter instituted a suit in the District Court of West Tanjore on the judgment obtained in the Colombo Court.

Held, (1) that the judgment of the Colombo Court could not be said to be one not given on the merits of the case, and that, therefore, the same was conclusive under section 13 of the Civil Procedure Code.

Mahomed Kassim & Co. v. *Seeni Pakir Bin Ahmed,* (1926) I.L.R. 50 Mad. 261: 52 M.L.J. 240 (F.B.), *Keymer* v. *Visvanatham Reddi,* (1916) I.L.R. 40 Mad. 112: L.R. 44 I.A. 6: 32 M.L.J. 35 (P.C.), *Abdul Rahiman* v. *Mahomed Ali Rowther,* (1928) I.L.R. 6 Rang 552 distinguished, and

(2) that the fact that the assignment by one of the plaintiffs of his share in the decree had not been recognised by the Colombo Court and the name of the assignee not substituted in the place of the assignor did not prevent the District Court of West Tanjore from recognising the assignment as the judgment of a foreign Court creats a debt and a debt is *prima facie* assignable.

Appeal against the decree of the District Court of West Tanjore in O.S. No. 3 of 1923.

T. Rangachariar and *K. Bhashyam Aiyangar* for appellants.

S. Varadachariar and *G. Rajagopalan* for respondents.

The judgment of the Court was delivered by

Ramesam, J.—This appeal arises out of a suit on a foreign judgment. The Lower Court granted a decree. The defend- Ramesam, J.

*Appeal No. 273 of 1924. 1st February, 1929.

Muhammad Moideen v. Chinthamani Chettiar.

Ramesam, J.

ants appeal. The plaintiffs-respondents are members of the S. K. R. S. K. R. Firm. This Firm acting through their agent Nachiappa Chetti and another A. V. R. V. Andappa Chetti filed a suit in the Court of the District Judge of Colombo, No. 46088. When the case came on for trial, both the parties filed a joint application to the effect that the trial of the case be postponed for three months with a view to settlement and that if not settled, judgment be entered for plaintiffs as prayed for with costs less Rs. 50 and that the property mortgaged with the plaintiffs be sold by Messrs. A V. Daniel & Sons, Licensed Auctioneers forthwith. This was on the 16th March, 1917. The case accordingly stood over for the 18th June. On that day the case was called on again and the District Judge passed this order:

"Case called. Mr. Somasundaram for plaintiff states that the case has not been settled. The defendant and his proctor are absent. Enter decree in terms of the order of 16th March, 1917"

The present plaintiffs also obtained an assignment of the share in the Ceylon decree belonging to the 2nd plaintiff therein and now sue to recover the whole of the amount of that decree.

Two objections are taken now by the learned Advocate for the appellants. The first objection is that the judgment of the Court of Ceylon is not conclusive because it has not been given on the merits of the case. *Vide* section 13 (*b*) of the Civil Procedure Code. He relied on the following decisions: *Mahomed Kassim & Co.* v. *Seeni Pakir Bin Ahmed*,[1] *Keymer* v. *Visvanatham Reddi*[2] and *A. N. Abdul Rahiman* v. *J. M. Mahomed Ali Rowther*.[3] In the first of these cases, the Penang Court passed a judgment against the defendant as he did not appear, according to the procedure of that Court. It was held that that judgment is not conclusive in British Indian Courts. The same view was taken in *A. N. Abdul Rahiman* v. *J. M. Mahomed Ali Rowther*[3] where it appears that there is a similar procedure according to an ordinance of Singapore similar to the ordinance in Penang. In *Keymer* v. *Visvanatham Reddi*[2] the former judgment was that of an English Court and the judgment was given on the ground of defendant's refusal to answer certain interrogatories and there was no trial. It was held by the Privy Council that the first judgment is not a bar. But all these cases are distinguishable from the present case. In

1. (1926) I.L.R. 50 M. 261: 52 M.L.J. 240 (F.B.).
2. (1916) I.L.R. 40 M. 112: L.R. 44 I.A. 6: 32 M.L.J. 35 (P.C.).
3. (1928) I.L.R. 6 Rang. 552.

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the present case, the defendants appeared. They filed their written statement and raised their plea and an issue was framed according to the plea. They had to prove that they made certain payments of interest. When the case came on for trial, they along with the plaintiffs filed a joint petition to the effect mentioned above. This is not therefore a case of non-appearance nor a case of a decree being passed on account of failure to comply with a provision of law. The defendants appeared and deliberately chose not to insist on their plea and not to adduce evidence of it. Mr. Rangachariar relied on Spencer Bower on "Res Judicata," p. 25 where it is observed that a decision cannot be called a "judicial decision" which does not purport to embody any consent to an existing judgment, but merely records an undertaking by a party to allow judgment to be signed if at a future date he fails to comply with certain conditions. Now as already observed this is not a case of failing to comply with certain conditions. The case in *Bradshaw* v. *M. Mullan*[4] is also relied on. This decision is really against the appellants. Towards the end of page 424 Lord Shaw of Dunfermline observes:

"It is, I am aware, possible to maintain that a judgment by consent has the qualities of a judicium to which I have referred. There are expressions of opinion in some of the numerous English cases upon the subject. It seems to me that such a doctrine may be founded, not upon the judgment pronounced, but upon the consent with all its limits and to all its extent which preceded the judgment; that, in short, you have there left the region of strict *res judicata* and entered the region of a possible wide estoppel."

It does not matter what the principle of recognising a foreign judgment is, whether it is called *res judicata* or estoppel, but that consent will do as estoppel is clear from the judgment of Lord Shaw. We are therefore of opinion there is no substance in the first point.

The second point argued is that the assignment of the decree by the 2nd plaintiff in the Ceylon Court ought not to be recognised in this Court because under section 339 of the Ceylon Ordinance that Court had not recognised the assignment and substituted the name of the assignee in the place of the assignor. The short reply to this argument is that the Ceylon Ordinance does not bind us and we have nothing to do with it. The judgment of a foreign Court creates a debt like any other judgment and a debt is *prima facie* assignable. It merely embodies the obligation of the defendants. There is nothing to prevent us from

4. (1920) 2 Ir. Rep. 412.

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Ramesam, J.

recognising the assignment. It is said that there is danger of the assignor executing the decree while the decree of this Court is in force. Mr. Varadachariar, the learned Advocate for the respondents, has offered to indemnify the appellants from any injury caused to them by any execution taken of the Ceylon decree by the assignor. It is enough to record this undertaking in this judgment and it is unnecessary to do anything more.

In the result, both the points fail and the appeal is dismissed with costs.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Assan Musaliarakath Kunhi Bava .. *Accused* in Sessions Case No. 56 of 1928 on the file of the Court of the Assistant Sessions Judge of South Malabar at Calicut.*

Kunhi Bava, *In re.*

Criminal Trial—Sentence—Punishment of imprisonment—Imprisonment till the rising of the Court—When justifiable.

When the Penal Code lays down that for a certain offence the punishment shall be imprisonment, it means that the offender shall go to jail and imprisonment till the rising of the Court is a clear evasion of that intention; and a Court is not justified in passing such a sentence except possibly in rare cases when the offence is obviously technical.

P. Govinda Menon for accused.

N. S. Mani for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The accused is clearly proved to have deliberately fabricated and used a false endorsement on a pro-note, for his defence in the suit upon the note, and was rightly convicted under Ss. 193, 196 and 471, Indian Penal Code. He was sentenced to imprisonment till the rising of the Court and to a fine of Rs. 300. He did not appeal. When the statute lays down that for a certain offence, as for that under section 471, Indian Penal Code or under section 193, the punishment shall be imprisonment, it means that the offender shall go to jail and imprisonment till the rising of the Court is a clear evasion of that intention.

Possibly in rare cases when the offence is obviously technical, a Court may be justified in taking the extreme step of

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*Cr.R.C. No. 846 of 1928. 13th December, 1928.
Taken up No. 68 of 1928.

Kunhi Bava, *In re.*

evading the statute which it is appointed to administer; but on the learned Judge's own showing, this was not such a case. That the accused is a fairly respectable man and not a hardened litigant are not circumstances of extenuation. Nor can he be described as the tool of the Vakil's clerk he is supposed to have employed; if the metaphor is to be used at all the Vakil's clerk was his tool. It was a clear case of deliberate fraud. Over and above the fine inflicted accused is sentenced to six months' rigorous imprisonment.

N.S. *Sentence enhanced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS.

P. Sankaran Pillai .. *Appellant** (*Prisoner*).

Sankaran Pillai, *In re.*

Post Office Act (VI of 1898), Ss 55 and 72—Prosecution for offence under S. 55—Sanction obtained after the beginning of the prosecution and not before—Effect.

It is not necessary that sanction to prosecute under S 72 of the Post Office Act must precede a prosecution under S. 55 of the Act, and a conviction for an offence under the latter section is valid even though the sanction to prosecute was obtained only after the prosecution was launched

Appeal against the order of the Court of the Assistant Sessions Judge, The Nilgiris, Ootacamund, in Case No. 87 of the Calendar for 1928.

Miss S. V. Devadoss and *T. A. Anantha Aiyar* for appellant.

K. S. Vasudevan for *The Public Prosecutor* on behalf of the Crown.

The Court delivered the following

JUDGMENT.—In this case the facts have been fully and I think correctly set out by the Assistant Sessions Judge. The accused who was the Sub-Postmaster of a small place called Cherambadi was convicted of criminal breach of trust or misappropriation in respect of a value payable article. This article was a cover addressed to himself containing a railway receipt for certain motor car parts which the proprietor of a bus plying between Cherambadi and Calicut, P.W. 3, had induced the accused to order for him from Bombay. The goods were duly ordered and arrived at Calicut Station and the accused took possession of this V.P.P. cover and of course of the railway receipt and also obtained delivery of the goods from the Calicut Station (or rather the bus conductor, P.W. 4, was the man who actually obtained the goods.) The Bombay firm who supplied

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*Cr. Appeal No. 550 of 1928. 25th January, 1929.

Sankaran Pillai, *In re.*

the goods sent them on the 27th April and on the 29th the parcel receipt was presented and the goods delivered. The Bombay firm was paid on the 27th June. The accused Post-master had of course to disguise the fact that he had taken possession of this V.P.P. letter and he did so by manipulating the register maintained in the Post Office, Ex. C series. The accused was convicted and sentenced to 5 years' rigorous imprisonment and a fine of Rs. 100 under section 409, I.P.C., read with section 52 of the Post Office Act and on the charge of having fraudulently prepared the V.P. Register with which he was charged under section 477-A and section 55 of the Post Office Act he was sentenced to one year. If the fine was not paid he was to undergo a further six months' imprisonment. The learned advocates for the accused have endeavoured to show that the accused received this railway receipt in an ordinary cover and not as a value payable article. In order to establish this of course Mr. Anantha Aiyar had to try and induce me to consider that the evidence of the manager of the Bombay firm, P.W. 5, was wrong or mistaken and that he must be incorrect when he says that this V.P. article was sent on the 22nd of April, 1927 from Bombay Hughes Road Post Office. I can see no reason for distrusting this gentleman, Mr. K. R. Srinivasan. Nothing in his cross-examination throws the slightest doubt on his accuracy.

The second point urged is that this story of the Post-master having purchased or arranged to purchase from the bus proprietor, P.W. 3, is got up for the occasion in order to account for the anxiety of the accused to obtain these motor parts. It does not seem to me to be at all unlikely and neither the bus proprietor, P. W. 3, nor his conductor, P.W. 4, were examined in any way to break down that story. It seems to me the only tenable theory to account for the somewhat extraordinary conduct of this man. He apparently was responsible for the payment of these motor parts and I can only suppose from the facts that are revealed that he had not the money to pay in April. He therefore wanted to put off payment as long as possible and he actually succeeded in putting it off for two months, from about the 29th April to about the 27th June.

Under section 72 of the Post Office Act sanction is required before a postal employee can be prosecuted for an offence under section 55 of the Post Office Act. The objection taken here is that the sanction was given after the prosecution had begun. This objection does not seem to have been taken in

Sankaran Pillai, *In re.*

the Lower Court. The section does not say that the complaint made under authority from the Director-General or Postmaster-General must precede the cognizance of the offence; that is to say, it does not seem to me to matter as long as sanction is obtained whether it is obtained before the Court takes cognizance of the offence or not. I think therefore the conviction under section 55 of the Post Office Act must stand. The sanction in this case is Ex. D and was dated 28th and 30th January. The complaint is dated 14th January of the same year.

For the first offence he received five years' rigorous imprisonment, and the reason why I have taken time to think over this case is that it has caused me some anxiety as to what the right sentence in cases of this sort is, because I am quite convinced that five years is extremely excessive. I am quite aware that the man is a postmaster and that postmasters and other persons occupying public posts of trust must be expected to carry out their duties conscientiously, and when they fail to do so they must be punished in accordance with the responsibility that rests upon them. If this man had tried or succeeded in converting to his own use money I should have taken a very different view of the case to what I am going to take. In a way I suppose and technically he did convert the money which was due to be paid on the 29th April for this V.P. article to his own use. What he actually got out of the transaction which was an extremely foolish one, for it has entailed the loss of his position, and I am told he is a man of 13 years service in the Postal Department, was a mere putting off of payment for two months. Under these circumstances I think that the accused will be properly punished by reducing his sentence to one year. I do not interfere with the sentence under section 477-A, I.P.C. and section 55 of the Post Office Act which will run concurrently with the other sentence.

If the fine is not paid I reduce the period of further imprisonment to three months.

N.S. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE JACKSON.

T. R. Sriramulu Naidu and another .. *Petitioners** (*Accused 1 and 3 in Trichinopoly Division S. C. No.* 10 *of* 1928).

Sriramulu Naidu, *In re.*

Indian Penal Code (XLV of 1860), *Ss.* 467 *and* 471—*Conviction of a person for forgery and using the forged document as genuine—Imposition of separate sentences—Validity—Criminal Procedure Code, S* 35—*Person actively participating in the presentation of the document for registration, though not physically presenting it—If can be convicted for offence under S.* 471 *of the Penal Code.*

Section 471 of the Indian Penal Code is no bar to the imposition of separate sentences on an accused person who is convicted at the same trial of both the offence of forgery and using the forged document as genuine; section 35 of the Criminal Procedure Code authorises the imposition of such separate sentences.

Queen-Empress v *Umrao Lal,* (1900) I.L.R. 23 All 84 disapproved.

A person can be convicted of an offence under S 471 of the Indian Penal Code if he is found to have actively participated in the process of presentation of the forged document for registration, even though he did not physically present it for registration.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Trichinopoly Division, dated 5th July, 1928, in Criminal Appeal No. 15 of 1928 preferred against the judgment of the Assistant Sessions Judge of Trichinopoly Division in Sessions Case No. 10 of 1928.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioners.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The judgment of the Court was delivered by

Waller, J.

Waller, J.—The 1st petitioner has been convicted under S. 467, I.P.C., of forgery. The 2nd petitioner has been convicted of abetment of forgery and of having used the forged document as genuine. The first objection taken is that they should not have been tried together. It is not, in our opinion, sustainable. The offences were parts of one and the same transaction and the 1st petitioner assisted the 2nd at both stages. The second objection is that the 2nd petitioner should not have been convicted of abetment, no separate charge of abetment having been framed against him. We see no reason to enter on a discussion of this somewhat vexed question, for the objection is

*Cr.R.C. No 624 of 1928. (Cr.R.P. No. 515 of 1928). 21st December, 1928

Sriramulu Naidu, *In re.*

Waller, J.

entirely academic. The Assistant Sessions Judge, though he convicted the petitioner of abetment of the forgery, passed sentence on him only for using the forged document as genuine; so that, even if we upheld the objection, the result—as far as the petitioner is concerned—would be exactly nothing. The Assistant Sessions Judge, in following the course he did, relied on a ruling from Allahabad, *Queen-Empress* v. *Umrao Lal*.[1] Aikman, J. thought that the words "as if he had forged such document" were directed against some person other than a person proved to be the actual forger and held that a man who both forged a document and used it as genuine could not be sentenced for both offences. With great respect, we cannot agree. All, it seems to us, that S. 471, I.P.C., lays down is that the sentence that can be imposed for the offence of using a forged document as genuine is the same as the sentence for that can be imposed for the offence of forgery. They are separate offences and, under section 35, Criminal Procedure Code, separate sentences may be passed on an accused person who has been convicted at the same trial of both. The last objection is that the 2nd petitioner should not have been convicted of an offence under section 471, Indian Penal Code, as it was another person that physically presented the forged document for registration. The evidence shows that the petitioner actively participated in the process of presentation. He was the prime mover in the affair and the second accused was a tool in his hands. He brought her to the Registrar's Office, was with her all the time and, knowing the document to be a forgery, aided in its use by lending his services as an identifying witness. He was therefore properly convicted.

The Criminal Revision Petition is dismissed.

N.S. *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

M. P. P. S. T. Palaniappa Chettiar and others .. *Appellants**

v.

Valliammai Achi .. *Respondent.*

Palaniappa Chettiar v. Valliammai Achi.

Limitation Act (IX of 1908), Art. 183—Revivor—Transferee decree-holder—Application for transmission of decree by—Order of Deputy Registrar recognising applicant as transferee decree-holder and transmitting decree for execution if operates as revivor—Order made after notice to judgment-debtors

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*O.S.A. No 56 of 1927 8th November, 1928.

1. (1900) I.L.R. 23 A. 84.

Palaniappa Chettiar v. Valliammal Achi.

On an application by a person claiming to be the transferee of a decree passed by the High Court on its Original Side for transmission of the decree for execution, the Deputy Registrar made an order, after notice to the judgment-debtors, recognising the applicant as transferee decree-holder and transmitting the decree for execution to the Ramnad Court.

Held, that the order of the Deputy Registrar operated as a revivor within the meaning of Art. 183 of the Limitation Act and gave a fresh starting point of limitation.

On appeal from the order of the Hon'ble Mr. Justice Waller, dated 2nd September, 1927 and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in E. P. No. 504 of 1926 in C. S. No. 98 of 1911.

Sir C. P. Ramaswami Aiyar and *V. Ramaswami Aiyar* for appellants.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for respondent.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS. *Coutts Trotter, C.J.*—Before dealing with the questions of law raised in this appeal it is necessary to set out briefly the facts which raise them. They are all matter of record and are not disputed. One Jayanna Rao Daga brought a suit, C.S. No. 98 of 1911 on the Original Side of this Court against a family of Nattukottai Chetties who may be described for the present purposes as M. P. P. S. T. which is their *vilasam*. On the 7th of January, 1912, he obtained a decree for Rs. 8,957; he took no steps to execute it, but on the 8th of May, 1913, he assigned his decree to one R. M. M. Subramaniam Chetti for a sum of Rs. 3,800. R. M. M. discovered that neither the judgment-debtors nor any of their property was to be found in Madras. So on the 17th of October, 1916, he applied to have the execution proceedings under the decree transferred to the District Court of Ramnad on the ground that the judgment-debtors resided within the jurisdiction of that Court and had immoveable properties situate there, and on the 8th of March, 1917, an order was made recognising him as transferee decree-holder and transmitting the decree for execution to the Ramnad Court. No execution was effected in the Ramnad District and the papers were returned to the Original Side of the Madras High Court. Meanwhile a side issue arose. One S. N. Subramaniam Chetti came forward and alleged that he was the principal behind R. M. M. Subramaniam Chetti, the decree-holder who was only his benamidar, and he issued an execution petition which was filed on the 17th of January, 1924, and on the very same day R. M. M. himself filed an execution petition as

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decree-holder. Kumaraswami Sastriar, J., passed an order on the 2nd of April, 1924, accepting S. N. Subramaniam Chetti as the true owner of the decree and allowed him to proceed in execution. That decision was brought up in appeal and was reversed by myself and Srinivasa Aiyangar, J., who held that where a transfer is evidenced by an instrument in writing in favour of a named person no one can come forward and allege that that person is a benamidar for himself [*Palaniappa Chettiar* v. *Subramania Chettiar*.[1]] There therefore remained pending the rival application of R. M. M. for execution; but before anything was done R. M. M. died, and his widow Valliammal applied to be brought on the record as his legal representative and to be allowed to continue the execution. The Judge of first instance, Srinivasa Aiyangar, J., allowed that to be done but on appeal that decision was reversed by myself and Curgenven, J., a decision reported in *Palaniappa Chettiar* v. *Valliammai Achi*.[2] Shortly afterwards Valliammal on the 3rd of December, 1926, made a fresh application for execution of the old decree in her own right. On the face of it, it was clearly barred by limitation, but Waller, J., held that the order of the Deputy Registrar, dated 8th of March, 1917, for transmission for execution of the decree to Madura operated as a revivor within the meaning of Art. 183 of the Limitation Act. It is from that order of Waller, J., that this appeal is brought.

The elaborate and learned argument before us has really centred on two points. The first is that the order of the Deputy Registrar transferring the decree for execution to another Court in March, 1917, gave a new starting point of limitation *qua* order of transmission. That contention is unsustainable after the decision of the Privy Council in *Banku Behari Chatterji* v. *Naraindas Dutt*.[3] The second is that the order transmitting the decree for execution to Ramnad also substituted R. M. M. as the person entitled to execute the decree; that this was a judicial act and gave a new starting point for limitation.

I will deal first with certain rules of Order 21, which deals with matters arising in execution. The governing rule is Order 21, Rule 16 in which the material words are as follows:

"Where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder"

1. (1924) I.L.R. 48 M. 553: 48 M.L.J. 419.
2. (1926) I.L R. 50 M 1.
3. (1927) L.R. 54 I.A. 129: I.L.R. 54 C. 500: 52 M.L.J. 565 (P.C).

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There is added the following proviso:

"Provided that, where the decree. ..has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution."

On the one hand it is contended that the order of the Deputy Registrar is a mere order of transmission, a ministerial act and involved no determination of a judicial character as to the validity of the alleged transferee to stand in the shoes of the original judgment-creditor, which is said to be a matter outside his jurisdiction even if he had purported to exercise it in that direction. All he had to do, it was argued, was to satisfy himself that the person who represented himself to be a transferee was able to produce documents which purported to disclose that character but that it was left at large in the transmitted execution proceedings for the judgment-debtors to contend that the alleged transferee in fact fulfilled no such character. In that view the order would be a ministerial and not a judicial act and would not give rise to a fresh period of limitation. It is certainly a startling result if a Deputy Registrar by this order can alter the whole law of limitation applicable in these matters. He was at liberty to refer the matter to a Judge which he would doubtless have done had he thought himself clothed with the power to pass a judicial as distinct from a ministerial order allowing the alleged transferee decree-holder to go on with the execution in the Ramnad Court. It is argued that his order amounts to no more than this:

"You allege yourself to be the transferee decree-holder and ask for an order of transmission to the Ramnad Court. That I do as a ministerial act and that is the effect of my order. The question as to whether you are in truth and in fact the transferee of the decree is one which must be decided by the Court in which execution must be sought and to which I have transferred the decree You take the order at your own risk, the risk, namely, of it being proved in the Ramnad Court that you cannot establish your claim there to be considered the true transferee decree-holder."

Much wider ground has been covered in the argument, and the industry of counsel has put before us all the learning of the English reports as to bills of revivor and writs of *scire facias*. I enter on such an enquiry with reluctance, but I do not see how I can escape it. The respondent's case is put thus: that wherever there is a change of parties under an order of Court there is a revivor, and consequently a new starting point of limitation. That is said to be the necessary result of the use of the word 'revived' in Art. 183 of the Limitation Act, because it throws us back on the English and Irish cases relat-

ing to bills of revivor and writs of *scire facias*. I have always regarded the Indian Limitation Act as the worst drafted piece of legislation which it has been from time to time my misfortune to be compelled to construe. But I think that the climax is reached in Art. 183 with its use of the word "revived," which could easily have been defined but was not. Of two things one: either the draftsman had acquainted himself with the English case-law on the subject or he had not. If he had not, he neglected a plain duty cast upon him by his own action in using a term of art like "revived" without attempting either to enquire into its history or to formulate his own definition of it; if he had, he must have known that the use of the term was a throwing of an apple of discord into the arena, which would set Indian counsels and Indian Judges to grope among the English authorities in the quest of a guiding principle. The pursuit has undoubted intellectual attractions akin to those which sustain a classical scholar in the task of collating manuscripts in the endeavour to produce an authoritative text of the ancient writer he has elected to edit. I see indications in the reported Indian cases that such an enquiry has presented those attractions to various Judges. For myself, I confess it has none. I have neither the knowledge nor the leisure in an already overworked Court to hope to master the subject sufficiently to throw any new light upon it. The Bar has given us the greatest assistance, delved into the English cases with diligence and put them all before us. I therefore feel it incumbent upon me to follow the example of other Indian Courts and briefly review the English case-law on the subject. I shall be brief for two reasons. If this case stops here—which I do not suppose it will—I do not wish to embarrass my successors by an extended discussion which would almost inevitably contain *obiter dicta* which it would probably be their duty in later cases to reject or explain away. If the case goes to the Privy Council, I am not foolish enough to suppose that an elaborate disquisition from me would give the Board any real assistance in a subject-matter which must be far more familiar to its members than to any Indian Court.

The first book cited to us was Tidd's Practice of which the 7th Edition is dated 1821 in which the following passage occurs:

> "The *scire facias* upon a change of parties is governed by the rule laid down in the case of *Penoyer* v. *Brace*,[4] but where a new person is to be benefited or charged by the execution of the judgment there ought to be a *scire facias* to make him a party to the judgment."

4. (1697) 1 Ld. Raym. 244.

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In Wharton's Law Lexicon, 12th Edition (1916) an elaborate account is given of the writ of *scire facias* with a significant note that "the writ though not abolished is now almost out of use." The equitable remedy of filing a bill of revivor is fully dealt with in Vol. XIII of the Encyclopædia of the Laws of England, 2nd Edition, page 1. There arose a series of cases in the Irish and English Courts which discussed the effect of the taking out of a writ of *scire facias* in which the point argued was whether a writ of *scire facias* merely continued an old cause of action as it stood at the time of the writ or whether it created a new right. The cases I refer to are *Farrell* v. *Gleeson*,[5] *Farran* v. *Beresford*,[6] *Ottiwell* v. *Farran*[7] and finally before an imposing bench of the Privy Council in *In re Blake*.[8]

I will take it that those decisions establish that a judicial determination following on the taking out of a writ of *scire facias* which gave the right to the new person on the record to continue execution under the old decree gave a new starting point of limitation. I fail to see the justice of holding that a statute-barred decree can be given a new life by the operation of an antiquated writ; but it is not for me to question the decisions of the House of Lords and the Privy Council. No later English or Irish case has been referred to in the argument before us and the matter stood thus when Art. 183 of the Limitation Act compelled the Indian Courts to come to some conclusion on the matter. All these cases have been cited before us. There are three decisions of the Calcutta High Court and several of the Madras High Court with which I will deal shortly. The decision in *Ashootosh Dutt* v. *Doorga Churn Chatterjee*[9] expressly bases itself on the English Common Law rule relating to the *scire facias*, namely, that a judgment on a writ of *scire facias* does not merely extend the original remedies but creates new ones; and that decision was followed in *Futteh Narain Chowdhury* v. *Chandrabati Chowdhrain*[10] and in effect in *Jogendra Chandra Roy* v. *Shyam Das*,[11] a very learned judgment in which the English case-law is exhaustively reviewed. The Madras Court proceeded on the same lines, *Ganapathi* v. *Balasundara*.[12] The trend of the later Madras cases is in the same direction, *viz.*, to hold that to bring a transferee decree-holder on to the record is not merely a recognition of his character as trans-

5. (1844) 11 Cl and Fin 702
6. (1843) 10 Cl. and Fin 319.
7. (1839) 2 Ir L Rep 110 at 144
8. (1853) 2 Ir. Ch. Rep. 643.
9. (1880) I L.R. 6 C 504.
10. (1892) I.L.R. 20 C. 551.
11. (1909) I.L.R. 36 C 543
12 (1884) I.L.R. 7 M. 540.

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feree decree-holder but is a step in execution which will save limitation. I will enumerate the cases without discussing them in detail. They are *Ramachandra Aiyar* v. *Subramania Chettiar*[13] and *Bolla Brahmadu* v. *Ruddaraju Venkataraju*.[14] In *Chutterput Singh* v. *Sait Sumari Mull*[15] the decision was obviously adverse to the present respondent's first contention.

The point therefore seems to narrow itself to this: Was the order of the Deputy Registrar of the 8th of March, 1917, a ministerial order or was it a judicial determination in so far as it not merely transmitted the case for execution to Ramnad but purported to recognize the position of the alleged transferee decree-holder? In the Code of Civil Procedure by Order 21, Rule 16, proviso, it is enacted that notice of an application for execution by a transferee decree-holder shall be given to the transferor and the judgment-debtor and the decree shall not be executed until the Court has heard their objections, if any, to its execution. It appears on the face of the order of the Deputy Registrar that such notices had been given. The actual words are these:

> "The defendants herein not appearing in person or by pleader though served with the said revival notices as appears by the affidavit of Doraikannu Mudaliar"

and the Deputy Registrar purported to affix to his order the statement that it was "by the Court" speaking through him. In view of that I should find it very difficult to hold, even if I had no further guidance on the matter, that that was other than a judicial act. Those affected had the right and the opportunity to be heard and they did not choose to avail themselves of it. But I think that the matter is concluded for me not merely by the words of Order 21, Rule 16 but by the pronouncement of the Privy Council in *Rajah of Ramnad* v. *Velusami Thevar*,[16] which appears to me to be a direct authority for the proposition that when a Court has recognised the assignment of a decree and passed an order allowing the assignee to execute it, that gives a fresh starting point of limitation and that it is not open to the judgment-debtor to contend that it did not act as a revivor. The Allahabad Court had consistently taken the same view: see *Dwarka Das* v. *Muhammad Ashfaqullah*.[17] I may point out that the decision of the Privy Council in

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13. (1903) 14 M.L.J. 393.
14 (1916) 33 I.C. 71. 15. (1916) I.L R. 43 C. 903 (F.B.).
16 (1920) L.R. 48 I.A. 45: 40 M.L.J 197 (P C).
17. (1924) I.L.R. 47 A. 86.

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Banku Behari Chatterji v. *Naraindas Dutt*[3] proceeded on the express ground that an order of transmission was not a judicial act, because it could be passed *ex parte* and that the matter was not affected by the fact that actually notices to the parties concerned had been given, because their Lordships held that they need not have been given and should not have been given; and that therefore the order of transmission remained what it was always meant to be under the Code a ministerial order. Under Order 21, Rule 16 notices not only may but must be given.

In the result, I feel myself compelled to hold that the Deputy Registrar's order of the 8th March, 1917, did give a fresh starting point of limitation. The result is one which I confess I greatly regret. These orders are passed without any realization of the far-reaching effects and implications they may have. In this case an original decree debt of Rs. 8,957 has been converted in the intervening years by accumulation of interest to a sum of Rs. 17,626 up to November, 1926, and at this date is nearly Rs. 20,000 and those who are to be the recipients of this large sum of money have obviously slept on their remedies for many years. I feel myself unable to find a way out. If this case goes to a higher tribunal I trust it will be able to discover that which escaped me. The appeal is dismissed with costs.

Pakenham Walsh, J.

Pakenham Walsh, J.—I concur with the conclusions of my Lord the Chief Justice with whom I have discussed the matter fully and have nothing to add.

A.S.V. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD SHAW, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Kumar Gopika Raman Roy .. *Appellant** (*Plff.*)

v.

Atal Singh and others .. *Respondents* (*Defts.*).

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Kumar Gopika Raman Roy v. Atal Singh.

Landlord and Tenant—Relation of, between Zemindar and Jotedars—Decree establishing—What amounts to—Construction of decree—Evidence Act, S. 43—Suits not inter partes*—Finding of fact in one of—Admissibility*

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*P.C. Appeal No. 81 of 1926. 22nd January, 1929.
Bengal Appeal No. 27 of 1924.

3. (1927) L.R. 54 I.A. 129: I.L.R. 54 C. 500: 52 M.L.J. 565 (P.C).

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in evidence in another in which that fact is in issue—Civil Procedure Code, O. 13, R. 2—Documents not produced at first hearing—Exclusion of—Rule as to—Applicability of, to documents not in possession or power of party and of whose very existence he was not aware at first hearing—Leave of Court to produce them later—Refusal of, in case of official records of undoubted authenticity—Propriety—Evidence additional—Admission by Privy Council of—Words—Jotedar—Meaning of.

The suit lands were admittedly dense jungle until, in 1828 or later, some of the defendants' predecessors began to cultivate them. In 1844 the Revenue authorities, treating them as *illam* or unsettled lands which were at the disposal of Government not having been included in any permanently settled estate, assessed them to Revenue; but the plaintiff's predecessors succeeded in getting the Revenue authorities in 1852 to reverse that decision and to recognise that those lands formed part of their permanently settled estate The defendants' predecessors, however, preferred the position of raiyats holding directly under Government and were unwilling to be included in the plaintiff's Zemindari Accordingly, plaintiff's predecessors instituted in 1854 a suit against defendants' predecessors for possession and mesne profits The pleadings in that suit showed that the suit was not instituted and was not fought out on the footing that there was any subsisting relation of landlord and tenant between the parties. The Court in that suit held that the lands sued for formed part of the permanently settled estate of the plaintiff's predecessors and passed a decree, which, after awarding to the then plaintiffs possession and past and future mesne profits of the lands, provided that so long as the then defendants were ready and willing to pay rents legally according to the rates prevailing in the village they should not be ousted from their right as jotedars

Held, that the portion of the decree providing for the defendants' predecessors continuing to own their right as jotedars so long as they were ready and willing to pay the rents specified could not be read as establishing the relation of landlord and tenant between the parties, but was to be read as giving the plaintiff a decree for possession with past and future mesne profits, subject to the condition that so long as the defendants were willing to pay rent at the specified rates to the plaintiffs they should not be ousted from their rights as jotedars.

It is clear that under the decree the defendants were only to be entitled to the right of jotedar if they were ready and willing to pay rent to the Zemindar

Findings of fact arrived at on the evidence before the Court in one case are not evidence of that fact in another case not *inter partes*

The rule as to exclusion of documentary evidence, laid down in the Civil Procedure Code, 1908, O. 13, R. 2, only comes into operation when the documents on which the parties rely should have been, but were not, produced at the first hearing of the suit. Accordingly, the rule does not preclude a party from producing in evidence at a late stage of the proceedings a document which was not in his possession or power at the date of the first hearing and of whose very existence he was not then aware.

Even where the rules of exclusion under O. 13, Civil Procedure Code apply leave under R. 2 of that order should not ordinarily be refused where the documents are official records of undoubted authenticity, which may assist the Court to decide rightly the issues before it.

Additional documentary evidence was admitted by the Privy Council because their Lordships were of opinion that the same was wrongly rejected by the Trial Judge.

Jotedar means cultivator.

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Appeal No. 81 of 1926 from a judgment and decree, dated the 17th April, 1924, of the High Court, Calcutta (Newbould and B. B. Ghose, JJ.), which affirmed a decree of the Court of the First Subordinate Judge of Sylhet, dated the 24th March, 1919.

The facts of the case are set out sufficiently in their Lordships' judgment. The case in the High Court is reported in 85 I.C. 678.

Gavin Simons, K.C. and *S. Hyam* for appellant.

De Gruyther, K.C. and *J. M. Parikh* for respondents.

22nd Jan. 1929. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—This is an appeal from a decree of the High Court at Calcutta affirming a decree of the First Subordinate Judge at Sylhet and dismissing the plaintiff's suit, which both Courts held to be barred by limitation.

The plaintiff sued as the owner of a one-seventh share of the permanently settled estate No. 85 of the Collectorate of Sylhet to eject defendants 1 to 160 from 143 holdings in the occupation at the date of the plaint of defendants 1 to 160, as shown in the first schedule to the plaint. Defendant 161 was joined as a purchaser from defendant 148, defendants 162 to 186 as the co-sharers with the plaintiff in the estate, and defendant 187 as vendor to the plaintiff's father in 1896.

The plaint alleged that by an amicable arrangement the lands in Schedule I had been allotted to a predecessor of the plaintiff in respect of a one-seventh share, which was afterwards acquired by the plaintiff's father in 1896, that they had all along been in the occupation of the defendants 1 to 160 as tenants, that in 1896 these defendants had rendered themselves liable to forfeiture by denying their landlord's title, that the plaintiff's father had enforced their forfeiture and determined the tenancies by instituting 120 suits in 1904, which were afterwards withdrawn by leave with liberty to bring a fresh suit, and that the present suit was within time because brought within twelve years of the determination of the tenancies by the institution of the aforesaid suits. There was also a plea that the suit was not barred because the plaintiff was entitled under section 14 of the Limitation Act to exclude the time spent in prosecuting the former suits, but this has not been relied on before their Lordships.

Defendants 1 to 160 pleaded, in addition to other defences, that they were not and never had been the tenants of the

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plaintiff and his predecessors-in-title, and both the Lower Courts, after a very careful examination of the evidence, have found that the plaintiff has failed to prove the alleged tenancies and so to bring the case within Art. 139 of the Limitation Act.

This was the only question argued on this appeal, and their Lordships, after carefully considering the evidence before the Lower Courts, and the additional evidence which they thought it right to admit in the circumstances hereinafter stated, have arrived at the same conclusion.

The case is a very unusual one because both the Lower Courts have found that the plaintiff has failed to prove any payment of rent to the plaintiff or his predecessors-in-title in respect of these lands ever since they began to be reclaimed and brought under cultivation about a hundred years ago. In these circumstances the learned counsel for the appellant has been obliged to rely mainly on the effect of a decree in a suit of 1854, which, as found in the plaintiff's favour, was between his predecessors-in-title and the predecessors of defendants 1 to 160.

It is common ground that the suit lands were dense jungle until, in 1828 or later, some of the defendants' predecessors began to cultivate them. In 1844 the Revenue authorities, treating them as *illam* or unsettled lands which were at the disposal of Government not having been included in any permanently settled estate, assessed them to revenue; and it was only after a long struggle that the plaintiff's predecessors succeeded in getting the Revenue authorities in 1852 to reverse this decision and to recognise that these lands formed part of their permanently settled estate No. 85 in the Collectorate of Sylhet.

It is also clear that the contesting defendants' predecessors preferred the position of *raiyats* holding directly under Government and were very unwilling to be included in the plaintiff's *zemindari*, and it was in these circumstances that the plaintiff's predecessors on the 24th March, 1854, instituted Suit No. 9 of 1854 in the Court of the Principal Sudder Amin of Sylhet against these defendants' predecessors for possession and mesne profits.

According to the allegations in the plaint (Exhibit 19), Pesal Chandra Rajkoer and other Manipuries, immigrants from the neighbouring State of Manipur, had executed *kabuliats* in favour of the husbands of two of the plaintiffs, who were widows, and had gone on paying rent to them until Shyan Singh, one of the defendants, and others had presented petitions alleging that these lands were *illam* and not included in the plaintiff's *zemindari*.

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It may be observed here that, if the plaintiffs had been in a position to prove these allegations, they might have framed their suit against the defendants to enforce their rights as landlords on the footing of a subsisting tenancy, but it is equally clear from the terms of this plaint that they did not do so.

After setting out that the Revenue authorities had assessed the suit lands as *illam* and had afterwards reversed their decision and paid over to the plaintiff the assessments they had collected, the plaint proceeded to state the cause of action against the defendants as follows:—

"The settlement holder(s) and *jotedar* defendants having been *raiyats* and *jotedars* of the disputed settled and unsettled lands, they are in joint possession of the disputed lands as such."

The defendants were referred to in this way because the Revenue authorities had only effected settlements with some of the defendants.

"After the disputed land was found, upon re-trial by the Sadar Board, to be revenue-paying land as appertaining to the said *taluq* belonging to us and was released from assumption as unsettled class of land, we on 1st Jaistha, 1259 (June, 1852), asked the defendants to give up possession of the disputed land, but instead of doing so the principal defendants are in possession of it as *ejmal* (joint). Accordingly we and the co-sharer defendants are entitled to get possession."

The plaint then concluded with a claim for past and future mesne profits, which it is unnecessary to set out.

In their Lordships' opinion this plaint is quite inconsistent with the view that there was any subsisting relation of landlord and tenant between the plaintiffs and the defendants in that suit.

It is equally clear from the summary of the written statements in the judgment (Exhibit 19-A) that the defendants repudiated any tenancy under the plaintiffs. Their case was that they had been "living on the land in dispute from 1255 B.S. (1828) and possessing the Government unsettled lands by bringing under cultivation the jungles."

It remains then to be seen whether the effect of the judgment was to establish a relation of landlord and tenant which was not the case of either side.

Some reliance has been placed on the finding on one of the preliminary issues that the defendants as *jotedars*, according to the ruling of the Court of Sudder Adalat, could not plead limitation against the *maliks* as owners. In their Lordships' opinion, this ruling, the grounds of which are not given, falls far short of affirming the existence of a subsisting tenancy.

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The Court then recorded its finding on the "issues regarding the facts affecting the claim," which were as follows:—

"Whether the disputed land belongs to the plaintiffs in purchased *zemindari* right as appertaining to *taluk* No. 85, Mahamad Jalal, within Mouza Patharkandi, and whether upon proper enquiries the said land was found to appertain to the said *taluk*, and was thereupon released by Government officers in favour of some of the plaintiffs, and whether the rent received from the *jotedar* defendants was paid back to the plaintiffs, and whether the objection made by the defendants that the said lands are *illam* lands, though they were released by the Sadar Board on behalf of the Government is admissible? And whether the plaintiffs are entitled to the mesne profits they have claimed?"

On this issue the Court held that it could not go behind the decisions of the Revenue authorities that the suit land was not *illam* land, and that it formed part of Estate No. 85. It accordingly proceeded to give the plaintiffs a decree for possession and mesne profits at specified rates.

"Therefore for the above reasons it is ordered that the suit be decreed in favour of the plaintiffs awarding Rs. 1,235-6-10 pies as mesne profits for the disputed lands in the plaintiffs' share for the years 1258 B S to 1260 B S at the rates mentioned above and costs in proportion to the claim together with mesne profits at the said rates from 1261 B S till recovery of possession and awarding them possession of the disputed land as per boundaries given in the plaint as *zemindars;* that as long as the defendants are ready and willing to pay rents legally according to the rates prevailing in the village they should not be ousted from their right as *jotedars,* that the defendants do pay to the plaintiffs the mesne profits due to them and the costs to the extent of the claim as well as cost in Court."

Their Lordships agree with the Lower Courts that the latter part of this order cannot be read as establishing the relation of landlord and tenant between the parties, which, as already observed, neither side had set up, but is to be read as giving the plaintiff a decree for possession with past and future mesne profits, subject to this condition that, so long as the defendants were willing to pay rent at the specified rates to the plaintiffs, they should not be ousted from their rights as *jotedars*.

"Jotedar," according to Wilson's Glossary, means cultivator, and it may well be that in those days, before the enactment of the Bengal Rent Act, 1859, the view was entertained that, by bringing these waste lands into cultivation, the defendants had acquired a right of occupancy of which they ought not to be deprived even though they had not set it up in their pleadings. But, whatever the right of the *jotedar* may have been in those days, it seems clear that under the decree the defendants were only to be entitled to it if they were ready and willing to pay rent to the *zemindar*, and there is abundant evidence in this case that they were not so willing, but entirely disregarded the decree.

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The plaintiff also relied on Exhibit 5, a certified copy of an award of the Deputy Collector of Sylhet in certain boundary cases under Reg. VII of 1822. The plaintiffs in those cases were the predecessors of the plaintiff, and Case D related to the alleged inclusion of 5,636 *bighas* of Estate No. 85 in other *mauzas*. The defendants' names are given as Ramanand Singh Mohan Singh and Nunai Singh, who are not shown to have been the predecessors of defendants 1 to 160 or any of them. The plaintiff relies on certain statements of the Deputy Collector in his award in this case as to rent having been realised by the plaintiffs in Suit No. 9 of 1854 from the defendants in that suit.

In their Lordships' opinion these statements are not admissible as evidence of rents having been realised from the defendants in that suit. The Indian Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. Their Lordships also agree with the Courts below that this evidence, even if admissible, would be of very little weight.

Their Lordships have next to deal with the fresh evidence which they decided to admit in the following circumstances.

On the 20th August, 1918, the plaintiff, before closing his case, called as his 32nd witness one Gopesh Charan Chowdury, 165th defendant, who was impleaded as one of his co-sharers. The witness produced certain documents which the Subordinate Judge would not allow to be filed at that stage. Thereupon the plaintiff on the 22nd August, 1918, presented a petition praying for the admission of these documents, supported by an affidavit in which it was stated that the plaintiff's law adviser only saw them for the first time on Sunday, the 18th August.

The Subordinate Judge did not accept this statement, as the last-mentioned witness had stated that the law agent had come to his house about two years ago—that is, in 1916—to see what documents he had, and the witness had showed him all the documents. In his order of the 22nd August the Subordinate Judge observed that the suit had been filed on the 7th October, 1912, and that after certain adjournments issues were settled on the 8th July, 1913, when the parties were directed to put in their documents within seven days. In these circumstances the Subordinate Judge apparently considered that they were out of time, and he refused to exercise his discretion in the plaintiff's favour, although the documents were certified copies of public records, because in his view it would have been prejudicial to the defend-

ants to admit them at this late stage, and this order was upheld by the Appellate Court.

Now, in addition to enabling the parties to a suit to apply for discovery of documents, a matter regulated by Order 11, the Code of Civil Procedure imposes certain obligations on parties to a suit with reference to the documents on which they rely. Under Order 7 the plaintiff must file with the plaint the documents on which he sues and also a list of the documents on which he relies, and under Rule 18 documents which ought to have been and have not been included in the list cannot be exhibited without the leave of the Court. Further, under O. 13 the parties at the first hearing must produce the documents in their possession or power on which they rely, and under R. 2 no document "which should have been but has not been produced in accordance with the requirement of this rule" is to be admitted in evidence without the leave of the Court. It is apparently under this Rule that the Subordinate Judge acted, as he observes that, on the 8th July, 1913, at the settlement of issues, which is at the first hearing, the parties were ordered to put in their documents within seven days.

This rule of exclusion, however, only comes into operation when the documents on which the parties rely should have been, but were not, produced at the first hearing. Now, according to the evidence at the date of the first hearing, these documents were not in the possession or power of the plaintiff, and the plaintiff and his advisers did not know of their existence so as to enable them to inspect them and form an opinion as to whether they would rely on them or not. In these circumstances it cannot be said that they should have been produced at the first hearing and therefore the rule does not authorise the exclusion. Further, as has been held in India, even where the rules of exclusion apply and the documents cannot be filed without the leave of the Court, that leave should not ordinarily be refused where the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it.

Their Lordships accordingly admitted the excluded documents, but find on examining them that they do not assist the plaintiff. Documents 2 and 3, which are copies of the measurement *chitta* prepared by the Amin in connection with the execution of the decree in Suit No. 9 of 1854 and the Amin's report, only show that the Amin had great difficulty in executing the decree by putting the plaintiffs in possession owing to the absence of the defendants, and do not show, as contended for the plaintiff, that

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he gave them only symbolical possession instead of vacant possession.

Documents Nos. 4 to 11 are judgments of the Collector of Sylhet in suits filed by the plaintiffs in Suit No. 9 of 1854 against defendants alleged to be in possession of eight holdings for the execution of *kabuliats.* The judgments directed the defendants to execute *kabuliats* in respect of their holdings, but these holdings have not been identified with any of the 143 holdings which are the subject of the present suit, nor have the defendants in these suits been shown to be the predecessors-in-title of any of the defendants 1 to 160 in the present suit. It is not proved that decrees for the execution of *kabuliats* were obtained against any of the predecessors of defendants 1 to 160.

Section 88 of the Bengal Rent Act of 1859 no doubt provides that where a decree has been passed for the execution of a *kabuliat* and the defendant refuses to execute it, the decree is to have the same effect as if the *kabuliat* had been executed, and in this way a tenancy might be proved; but in the present case it is not shown that decrees for the execution of *kabuliats* were obtained against the predecessors of defendants 1 to 160 or that they refused to execute them.

For these reasons, in their Lordships' opinion, the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Stanley Joynson & Allen.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Elavarthi Peddabba Reddi .. *Petitioner* (Accused)*

v.

Iyyala Varada Reddi .. *Respondent (Complt.).*

Peddabba Reddi v. Varada Reddi.

Defamation—Prosecution for—Liability for—Witness—Statements made on oath before Court by—Liability as regards—Privilege which witness is entitled to—Absolute privilege—Limited privilege under S. 499, Indian Penal Code—Evidence Act, S. 132, Proviso—"Compelled to give"—Meaning and test of.

A witness has not an absolute privilege as regards the statements made by him but has only a qualified privilege.

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*Cr.R.C. No. 424 of 1928. 27th November, 1928.
Cr.R.P. No. 342 of 1928.

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A witness who is prosecuted for defamation in respect of statements made by him on oath before a Court has two courses open to him. He may plead in bar of the prosecution the protection given to him under S. 132 of the Evidence Act. If he did not claim the protection of S. 132 when he gave his evidence he can claim only the limited privilege given by the 9th exception or any other exception to S. 499 of the Indian Penal Code.

Per Devadoss, J.—The words "compelled to give" in the Proviso to S. 132 of the Evidence Act do not refer merely to the ordinary obligation of a witness to answer all questions put to him. In all cases it is a question of fact whether there was or was not compulsion. It is not necessary that the compulsion must be in any set form of words or that the asking of the protection should be in any particular form. If the witness is made to understand that he must answer all questions without exception, it would amount to compulsion. The Proviso is not confined to cases in which the witness asks in so many words the protection of the Court under S. 132

Per Waller, J.—Worded as it is, the Proviso seems to require a request by the witness to be excused from answering and a compulsion by the Court on him to answer.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order framing a charge against the petitioner (accused) of the Sub-divisional Magistrate of Chittoor, dated 29th March, 1928 in Calendar Case No. 11 of 1928.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioner.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

T. K. Srinivasathathachariar and *N. R. Raghavachariar* for respondent.

The Court made the following

Devadoss, J.

ORDER. *Devadoss, J.*—The petitioner is being prosecuted for defamation in respect of certain statements made by him as a witness before arbitrators. He has applied to this Court for quashing the proceedings against him on the ground that no indictment for defamation would lie in respect of statements made in answer to questions by counsel. The question for determination is: "Is a witness absolutely privileged as regards statements made by him on oath in answer to questions by counsel or Court except as to a charge for perjury?" So far as the Criminal Law of this country is concerned, defamation is defined in section 499 of the Indian Penal Code. Section 499 contains ten exceptions and a person who pleads privilege has to bring himself within one or more of the ten exceptions. The first exception and the 9th exception afford sufficient protection to a witness; in the case of the first exception, the imputation should be true and for the public good, and in the case of the ninth exception, imputation should be made in good faith for the protection of the interest of the person making it or of any

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other person or for public good. What is claimed for the petitioner is absolute privilege whether the statement be relevant or irrelevant, *bona fide* or malicious or false or true. In other words, a eleventh exception is sought to be added to section 499 to provide for the case of witnesses.

The Criminal Law of India as to defamation is different in many respects from the English Law. Under the Penal Code all libels and slanders are indictable, for section 499 begins thus:

"Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes, etc. . . . ."

Under the English Law slander is not indictable except in the case of slanderous words to a Magistrate in the execution of his office. Only certain cases of libel are indictable, such as seditious libel, blasphemous libel, libel affecting the administration of justice, obscene libel and defamatory libel calculated or intended to provoke a breach of the peace or to expose a person to public hatred, contempt or ridicule or to damage his reputation. In the Indian Criminal Law there is no distinction between libel and slander. When a statute like the Penal Code contains exhaustive provisions as to the law of defamation we cannot hold that an exception was left out and that the Court should engraft an exception to the codified law. The Penal Code which was drafted by Lord Macaulay in the early thirties and was considered by more than one Law Commission did not become law till 1860. When a Code has been in a state of gestation for more than 20 years, it should not be lightly considered to have omitted anything material. The framers of the Indian Penal Code were English lawyers who were familiar with the state of the law at the time in England, and if they had wanted to give absolute protection to a witness, they would have done so in so many words and it is bad policy to add to codified law some of the provisions of the English Common Law on the ground that the codified law is silent as to them. The words of a statute should not be departed from on the ground that something was omitted to be enacted. In this view I hold that a witness has not absolute privilege as regards the statements made by him but has only a qualified privilege under the ninth exception or first exception to section 499 of the Indian Penal Code. In *Gopal Naidu* v. *King-Emperor*[1] it was held:

"The Criminal Law of India has been codified in the Indian Penal Code and the Criminal Procedure Code; the former Code deals specifically with offences and states what matters will afford an excuse or a defence

1 (1922) I.L.R. 46 M. 605: 44 M.L.J. 655 (F.B).

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to a charge of any offence and the Court is not entitled to invoke the Common Law of England in such matters at all."

Reliance is strongly placed by Mr. Ethiraj upon *Manjaya* v. *Sesha Shetti*[2] in support of his contention. In that case it was held by Collins, C.J. and Shephard, J., that a conviction under section 500, Indian Penal Code, could not be sustained in respect of a statement made by a witness under cross-examination. The learned Chief Justice relied upon *Seamen* v. *Netherclift*[3] and *Goffin* v. *Donnelly*[4] and Shephard, J., relied upon an observation of the Judicial Committee in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*.[5] In *Seamen* v. *Netherclift*[3] Cockburn, C.J., observed:

"If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins* v. *Rokeby*,[6] after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the enquiry is privileged, notwithstanding it may be malicious; and to ask us to decide to the contrary is to ask what is beyond our power."

In *Goffin* v. *Donnelly*[4] the action was in respect of the statement made by a witness before the Select Committee of the House of Commons. Field and Manisty, JJ., held that the principle of *Seamen* v. *Netherclift*[3] applied to the case. In *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*[5] their Lordships observed:

"Witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognised by all the Courts of this country to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justices that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

Notwithstanding the high authorities relied upon by the learned Chief Justice and Shephard, J., in *Manjaya* v. *Sesha Shetti*,[2] the question still remains whether the Penal Code did not make a departure from the English Law. As already stated the Criminal Law of defamation is different from the Criminal Law of England as to libel and slander and the privilege that is accorded to a witness in England on grounds of policy is deli-

2. (1888) I.L.R. 11 M. 477. 3. (1876) L.R. 2 C.P.D. 53.
4. (1881) L.R. 6 Q B D 307. 5. (1872) 11 Beng. L.R. 321 at 328 (P.C.).
6. (1875) L.R. 7 H.L. 744.

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berately cut down by the framers of the Penal Code to statements made in good faith for the protection of the interests of the person making it or of any other person or for public good. With due respect I decline to follow *Manjaya* v. *Sesha Shetti.*[2]

The next branch of the argument is that under the law a witness is compelled to answer all questions put to him and therefore the protection given by section 132 of the Evidence Act applies to all statements made by him in Court. Under the English Law of evidence a witness cannot be compelled to answer certain kinds of questions. Sections 121 to 129 contain the provisions as to questions which a witness cannot be compelled to answer. Sections 130 to 131 relate to production of documents. Section 132 is:

> "A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness, or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind Provided that no such answer which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

The English Law as to privilege of a witness from being compelled to answer certain questions was taken away by section 32 of Act II of 1855, and the present section 132 of the Evidence Act is a reproduction of that section. In order to avail oneself of the protection given, he must bring himself within the provision; in other words, he should be compelled to answer the questions. The contention of Mr. Ethiraj is that the mere fact that witness is asked to get into the witness box and is sworn to tell the truth and nothing but the truth is tantamount to compulsion under section 132 of the Evidence Act. Section 132 is clear in its terms. It says that no witness shall be excused from answering any question on the ground that the answer might expose him to civil or criminal proceeding or may tend to his prejudice. The proviso protects him from arrest or prosecution or proof of the statement in criminal proceeding against him except as to perjury. The compulsion contemplated in S. 132 is something more than being put into the box and being sworn to give evidence. The compulsion may be expressed or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. If the witness is made

2 (1888) I.L.R. 11 M. 477.

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to understand that he must answer all questions without exception, it would amount to compulsion. In all cases it is the question of fact whether there was or was not compulsion. Whether the witness seeks the protection of the Court in a set form of words or not, if the witness is made to understand directly or indirectly that he has no option in the matter but to answer all the questions put to him, I conceive he would bring himself within the proviso to section 132. I am not prepared to hold that the proviso would only apply to witnesses who ask in so many words the protection of the Court under section 132. The words of the proviso should be understood in the ordinary sense and the word "compelled" means forcing or insisting upon a witness to answer the question. The witness may not know that he should apply for protection; but any reasonable man ought to know that any statement defamatory of another would expose him to a charge of defamation. If he hesitates to answer and the Court tells him he must answer the question, I would hold that that hesitation and the direction of the Court to the witness to answer would bring the witness within the proviso.

In *The Queen* v. *Gopal Doss* [7] it was held by the majority of the Full Bench that where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement, if relevant, may be used against him on his trial on a criminal charge. In that case an affidavit and the deposition of the accused made in Small Cause Suit were sought to be put in evidence against the accused. Turner, C.J., Innes and Kindersley, JJ., held that both the affidavit and the deposition were properly admitted. Kernan and Muthuswami Aiyar, JJ., held that the affidavit was properly admitted but not the deposition. The contention that a witness as soon as he is sworn is compelled by law to answer all questions was put forward by Mr. Handley who appeared for the prisoner. The learned Chief Justice negatived the contention and observed at page 278:

"If the term 'compelled' in the proviso to section 132 and 'compel' in section 148 do not refer to the Court, but to the obligation of the law, then the witness is left without protection if the Court arrives at an erroneous conclusion as to whether or not the question is as to a matter which the witness is bound to answer, or if he has incautiously answered an irrelevant question. On the other hand, if the term refers to the constraint put upon the witness by the authority before whom he is examined, he is protected whether that authority has decided rightly or wrongly that the question is such as the witness is bound to answer. If it had been the intention of the legislature to protect the witness whenever he

7. (1881) I.L.R. 3 M. 271 (F.B.).

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was, or believed himself to be, constrained by law to give an answer criminating himself, then this intention could clearly have been expressed in very much more simple language; and if unlearned persons, not assisted by counsel, are not to be placed in a worse position than persons who are acquainted with the law or have the benefit of professional assistance, I can suggest no reason why the protection should not have been extended to all answers whether relevant or irrelevant The terms of section 132, especially when read with the rest of the Act, impel me to the conclusion that protection is afforded only to answers to which a witness has objected or has been constrained by the Court to give."

With this observation of the learned Chief Justice I respectfully agree and I would add that the expression "has been constrained by the Court to give" used by the learned Chief Justice should be understood in a liberal sense. The constraint need not be in so many words and the protection for the witness need not be in any particular form or in any set words.

Great reliance is placed by Mr. Ethiraj upon the recent decision of Mr. Justice Walsh in *Emperor* v. *Ganga Sahai*.[8] In that case the learned Judge held "that a witness in a civil suit cannot be prosecuted for defamation in respect of an answer made by him to a question asked by the Court." He differed from two judgments of his own Court and held that the word "compelled" means the obligation under the law to answer questions. In that case the question was by the Court. When a Court asks a question, it may be inferred that the Court insists upon an answer; with due respect that by itself would not be sufficient to bring the witness within the proviso of section 132. If he hesitates to answer or if he says "I cannot answer or I won't answer" without actually asking for protection and if the Court says "you must answer " and he answers, he is within the exception. Where the Court makes a witness understand that he has no option but to answer, the proviso would apply whether the witness asks for protection or not, but to hold that the ordinary obligation of a witness to answer all questions is to make the proviso meaningless. The learned Judge quotes the observation of Piggott, J., in *Kallu* v. *Sital*,[9] but the sentence following the extract "whether this be so or not, I think the principle laid down in these rulings fully applies to the facts of the present case" shows how Piggott, J., viewed that matter. In *Queen-Empress* v. *Moss*[10] Sir John Edge, C.J., observed:

"In my opinion 'compelled' in section 132 of the Indian Evidence Act only applies where the Court has compelled a witness to answer a question, and not to a case in which the witness has not asked to be excused from answering a question, but gives his answer without any

8. (1920) I.L.R. 42 A 257. 9. (1918) I.L.R. 40 A. 271.
10. (1893) I.L.R. 16 A. 88.

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claim to have himself excused. I think that in reading section 132 and considering the word 'compelled' in the proviso, we must not overlook the earlier part of the section, which says 'a witness shall not be excused'."

In *Kallu* v. *Sital*[9] Piggott, J., held that "compelled" means compelled by the Court. The learned Judge felt the difficulty of the ignorant witnesses not being able to claim the protection afforded by section 132 and also the difficulty of framing the request so as to satisfy the terms of the section and observed:

"Obviously no form of words can be prescribed in which this claim is to be made; and I conceive that cases may arise in which the Courts will be compelled to hold that the claim has been made by implication, or that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness-box."

In *Emperor* v. *Chatur Singh*[11] Tudball, J., held that

"an answer given by a witness in a criminal case on oath to a question put to him either by the Court or by counsel on either side, especially when the question is on a point which is relevant to the case, is within the protection afforded by section 132 of the Indian Evidence Act, 1872, whether or not the witness has objected to the question asked him."

He held that

"he had no doubt whatsoever that the accused persons in the present case were compelled within the meaning of the law to answer the questions put to them when they entered the witness-box."

With due respect I am unable to agree either with the reasoning or with the conclusion of the two learned Judges, Walsh, J., and Tudball, J., in *Emperor* v. *Ganga Sahai*[8] and *Emperor* v. *Chatur Singh*.[11] As observed by Turner, C.J., if the interpretation of these two learned Judges is correct, the proviso to section 132 may as well be omitted. In *Bai Shanta* v. *Umrao Amir*[12] it was held by the Full Bench of the Bombay High Court:

"Relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding cannot be held to be protected by the proviso to section 132 of the Indian Evidence Act, in case where the witness has not objected to answering the question put to him."

In *Tiruvengada Mudaliar* v. *Tripurasundari Ammal*[13] it was held that defamatory statements in complaints to Magistrates are not absolutely privileged. The cases in *Dr. Mir Anwaruddin* v. *Fathima Bi Abidin*[14] and *McDonnell* v. *King-Emperor*[15] are cases of Advocates and need not be considered as the point is not before us. In *Emperor* v. *Banarsi*[16] it was held:

8. (1920) I.L.R. 42 A. 257.
9. (1918) I.L.R. 40 A. 271.
11. (1920) I.L.R. 43 A 92.
12. (1925) I.L R. 50 B. 162 (F.B.).
13. (1926) I.L.R. 49 M 728: 51 M.L.J. 112 (F B).
14. (1926) 52 M.L.J. 269. 15. (1925) I.L.R. 3 Rang. 524.
16 (1923) I.L.R. 46 A. 254.

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"Whether or not a witness is compelled within the meaning of S. 132 of the Indian Evidence Act to answer any particular question put to him while in the witness-box is in each case a question of fact."

It is strongly urged that on grounds of public policy a witness should be free to answer questions put to him in examination or in cross-examination or by the Court. The expression "public policy" is not capable of any accurate definition. It is as much public policy to protect a witness from harassment as it is to protect the character and reputation of a party or a person not connected with the matter before the Court. It is a matter of common experience that parties and witnesses attack the character and reputation of the relations of the opposite party maliciously; unfounded allegations are made recklessly with a view to injure such persons, and it is within my experience that many persons avoid going to the Court for fear of being exposed to unfounded imputations and slanderous remarks. In a petty case of assault the Advocate for the accused may be instructed to put the most obnoxious and slanderous questions to the complainant or to his witness affecting the character and reputation of the female members of his family. Is it in the interests of public policy to expose innocent persons like the complainant's relations to the imputation contained in the question by reason of the protection that the law is supposed to give to the accused in defending himself? Anything which is *bona fide* and which would protect his interest, in other words, which would bring him within exception 9 to section 499 is privileged. But to allow a witness to make the most unfounded insinuation or allegation against any person without restraint is certainly opposed to public policy. The administration of justice in my opinion would not suffer by limiting the privilege to that contained in the exceptions to section 499 of the Indian Penal Code. A witness who is prosecuted for defamation in respect of statements made by him on oath before a Court has two courses open to him. He may plead in bar of the prosecution the protection given to him under section 132 of the Evidence Act. If he did not claim the protection of section 132 when he gave his evidence he can claim the privilege given by the ninth exception or any other exception to section 499 of the Indian Penal Code. I hold that the petitioner has not the absolute privilege claimed by him but has only a qualified privilege given by the exceptions to section 499 of the Penal Code.

The petition is dismissed.

Waller, J.

Waller, J.—This petition raises the question whether statements made by a witness are entitled to absolute or only to quali-

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fied privilege. The petitioner was examined as a witness before arbitrators. In the course of his evidence he made certain statements regarding the respondent, on which the respondent charged him with criminal defamation. Mr. Ethiraj asks us to quash the proceedings on the ground that the statements are entitled to absolute privilege. He relies on the decision in *Manjaya* v. *Sesha Shetti*,[2] but that decision is based on the Common Law of England and more recent decisions of this Court have held that, in matters of this kind, we must look to the Statutory Law of India and not to the Common Law of England for guidance. I must therefore hold that we are in no way bound by it.

Mr. Ethiraj falls back on section 132 of the Evidence Act, which, he contends, affords absolute protection to a witness who has answered a relevant question. This contention was considered and rejected by a Full Bench of this Court in *The Queen* v. *Gopal Doss*.[7] The majority of the Bench held that

"if a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled."

Mr. Ethiraj asks us to say that the majority of the Judges based their ruling on the English Law and to concur in the opinion of the minority. It seems to me perfectly clear that their ruling was based on the construction of the language of the section and on nothing else. With great respect, I do not see how the language could have been construed otherwise. Had it been the intention of the legislature to refer to a general obligation of law and not to specific compulsion by a Court, the section would have been very differently worded. Worded as it is, it seems to require a request by the witness to be excused from answering and compulsion by the Court on him to answer. This ruling was followed by Piggott, J., in *Kallu* v. *Sital*[9] and also in *Queen-Empress* v. *Moss*.[10] Walsh, J., in *Emperor* v. *Ganga Sahai*[8] did not consider *The Queen* v. *Gopal Doss*[7] at all. As regards *Queen-Empress* v. *Moss*[10] he thought that the ruling was *obiter*. Some remarks made incidentally by Piggott, J., in *Kallu* v. *Sital*[9] be quoted with approval in which that learned Judge observed that he could

"conceive that cases might arise in which the Courts will be compelled to hold that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness-box;"

2 (1888) I.L.R. 11 M 477. 7 (1881) I L R. 3 M. 271 (F B.).
8 (1920) I.L.R 42 A 257. 9. (1918) I L.R. 40 A. 271.
10. (1893) I.L R, 16 A 88.

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but that seems dangerously near the theory of a general obligation of law which the Madras decision—and Piggott, J., was following it—expressly repudiated. In any event, what Walsh, J., decided was that a witness, who was questioned by the Court itself, was bound to answer and was therefore protected. When such a case arises here, it will be time to decide whether his view is correct. In *Emperor* v. *Chatur Singh*[11] Tudball, J., held that answers given by witnesses on relevant points to the Court or to a counsel on either side were protected by section 132 of the Evidence Act. He relied in fact on the theory of a general obligation of law, which was rejected by the Madras Full Bench and in *Queen-Empress* v. *Moss*[10] and *Kallu* v. *Sital.*[9] In the most recent Allahabad case, *Emperor* v. *Banarsi*[16] Walsh and Ryves, JJ., held that the question whether a witness was "compelled" to answer a particular question was, in each case, one of fact. In *Bai Shanta* v. *Umrao Amir*[12] a Full Bench of the Bombay High Court took the same view of section 132 as was taken by the Full Bench in the *The Queen* v *Gopal Doss.*[7]

Following the ruling in *The Queen* v. *Gopal Doss*[7] I must find that, in this case, the petitioner who answered a question or questions put to him by his counsel without seeking the protection of S. 132 of the Evidence Act is not entitled to that protection. All that he is entitled to is the limited privilege afforded to him by section 499 of the Indian Penal Code. He must prove that he made the imputations against the respondent in good faith for the protection of his own or some other person's interest. I agree that the petition should be dismissed.

A.S.V. *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR JUSTICE VENKATASUBBA RAO.

J. P. Rego .. *Appellant* (Plff.)*

v.

Phillip Tauro and another .. *Respondents (Defts.).*

Rego v. Phillip Tauro.

Civil Procedure Code (V of 1908), O 2, R 2—Mortgage deed providing for payment in instalments of principal and interest then due—Default

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*Appeal No 354 of 1924 11th December, 1928

7 (1881) I.L.R. 3 M 271 (F B)

9. (1918) I.L.R. 40 A 271 10 (1893) I.L.R. 16 A 88

11 (1920) I.L.R. 43 A 92

12. (1925) I.L.R. 50 B. 162 (F.B.).

16. (1923) I.L.R. 46 A. 254.

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clause providing, in event of default, for payment at enhanced rate of interest of whole amount due under mortgage irrespective of provision for payment in instalments—Default of mortgagor in payment of first instalment—Suit by mortgagee for recovery by sale of amount of that instalment at the enhanced rate and decree therein—Subsequent suit by him, on further default, of recovery of the balance amount due to him under bond—Maintainability.

A mortgage bond, dated 31st May, 1918, provided for the payment of the principal in four instalments on the 31st May of each year beginning with 1919 and ending with 1922. It was also stipulated that on the same day the interest (at 8 per cent. per annum) due on that date should be paid The deed continued: "If I fail to pay to you the amount of interest payable annually and also the principal amount according to the *vaidas* mentioned above and keep in arrears the amount of any one of the instalments the future *vaida* to pay the principal amount shall become cancelled and I shall be liable to pay to you all the amounts immediately irrespective of future *vaidas* together with interest at 10 per cent. per annum from the date of default of payment of the said instalment on the principal and interest of the instalment amount kept in arrears and also on all the amounts due to you by me in respect of future instalments"

The mortgagor committed default in the payment of the first instalment on 31st May, 1919. The mortgagee then filed a suit to recover the said instalment. In his plaint in that suit he alleged that he waived the benefit of the provision in the bond and reserved his right to sue the defendant separately should he commit default in payment of the subsequent instalments. In calculating the amount due to him, he calculated interest on the amount of the instalment from 1st June, 1919 up to the date of suit at 10 per cent per annum. That suit was decreed, the decree being one for sale of the mortgaged property or a sufficient part thereof. In a suit subsequently filed by the mortgagee on 21st February, 1923 to recover all the amounts of the remaining instalments, interest being calculated at 8 per cent up to the date of each of the instalments and at 10 per cent. per annum from the date of default, *held,* that the suit was not barred under O. 2, R. 2, Civil Procedure Code.

Appeal against the judgment and decree of the Court of the Subordinate Judge of South Kanara at Mangalore, dated the 4th day of February, 1924, and passed in Original Suit No. 15 of 1923.

B. Sitarama Rao for appellant.

K. Bhashyam Aiyangar for respondents.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—This appeal arises out of a suit on the foot of a mortgage bond (Ex. A), dated 31st May, 1918. The amount borrowed under the bond was Rs. 5,000 and the interest was 8 per cent. per annum. The principal was payable in four instalments on the 31st May of each year beginning with 1919 and ending with 1922. It is also stipulated that on the same day the interest due on that date should be paid. Then there is the further clause: Ramesam, J

"If I fail to pay to you the amount of interest payable annually and also the principal amount according to the *vaidas* mentioned above

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——
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and keep in arrears the amount of any one of the instalments the future *vaida* to pay the principal amount shall become cancelled and I shall be liable to pay to you all the amounts immediately irrespective of future *vaidas* together with interest at 10 per cent. per annum from the date of default of payment of the said instalment on the principal and interest of the instalment amount kept in arrears and also on all the amounts due to you by me in respect of future instalments"

The mortgagor committed default in the payment of the first instalment on the 31st May, 1919. The mortgagee then filed a suit (O.S. No. 404 of 1919) to recover the said instalment. The plaint is Ex. I. In paragraph 4 of the said plaint it is alleged that the plaintiff waives the benefit of the provision in the bond and reserves his right to sue defendant separately should he commit default in payment of the subsequent instalments. In calculating the amount due to him, he calculated interest on the amount of the instalment from the 1st June, 1919 up to the date of suit at 10 per cent. per annum. That suit was decreed. It was a decree for sale of the mortgaged property or a sufficient part thereof. The present suit was filed on the 21st February, 1923 to recover all the amounts of the remaining instalments, interest being calculated at 8 per cent. up to the date of each of the instalments and at 10 per cent. per annum from the date of default. The defendant raised the question that the suit was barred under Order 2, Rule 2 of the Civil Procedure Code. This is the subject of the first issue. The Subordinate Judge found that the suit was barred except as to a certain item which it is unnecessary to refer to and dismissed the suit so far as the amounts of instalments are concerned. The plaintiff appeals.

The question whether in such a case the suit is barred under Order 2, Rule 2, Civil Procedure Code, has been argued recently before me and my learned brother, Jackson, J. Our decision is reported in *Mukyaprana Bhatta* v. *Kelu Nambiyar*.[1] The only difference between that case and the present case is, that that was a case of a mortgage arising out of a chit fund. Otherwise the two cases resemble, and if we follow that case we will be bound to hold that the suit is barred under O. 2, R. 2, Civil Procedure Code. But Mr. Sitarama Rao, the learned Advocate for the appellant, who also happened to argue the former case brought to our notice certain additional considerations, and the cases bearing upon them, and the appeal has also been elaborately argued by Mr. K. Bhashyam Aiyangar for the respondents.

1. A.I.R. 1928 Mad 705.

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Ramesam, J.

I must start the discussion by observing that in most cases, if not in all cases, the considerations arising in a case where the defendant relies on Order 2, Rule 2 are the same as where the defendant's plea is one of limitation. I made observations to the same effect in the former decision though I was willing to keep aside the decisions bearing on the question of limitation following the example of several learned Judges who dealt with similar points. In *Srinivasa* v. *Chanbasappa Gowda*,[2] a case not mentioned on the last occasion, Macleod, C.J. and Crump, J., observe:

"But, as a matter of fact, the two issues are really connected with each other, because if the right of action to sue for the whole amount arose in 1905, when the first default was made, then clearly the present suit was barred by limitation It was also barred under O 2, R 2, because the plaintiffs chose to file a suit in 1905 for two instalments, when they ought to have claimed the whole of the relief to which they were then entitled."

I am inclined to agree with the learned Judges to the extent that both the issues were connected with each other and either both must be decided for the plaintiff or both must be decided against him in general. Remembering this consideration I will now proceed to discuss the cases. So far as the two decisions of the Privy Council in *Kishen Narain* v. *Pala Mal*[3] and *Muhammad Hafiz* v. *Muhammad Zakariya*[4] (now relied on by the Subordinate Judge) are concerned, I adhere to what I said in my last judgment, *i.e.*, they do not help either way as they are plain cases where O. 2, Rule 2 ought to be applied. This is also the view of our learned brothers, Kumaraswami Sastri and Curgenven, JJ., in *Sivasubramania Pillai* v. *Nagappa Pillai*.[5] Then there is a group of cases in which the bond contains words like "when required" or "when you require" or "if you choose." I am willing to say that such cases stand on a different footing, and I collected all such cases in my former judgment. Whether the decision in *Velliappa Chettiar* v. *Venkatasubbarayulu Nayndu*[6] should be classed in this group—because the words there are "You shall be at liberty to recover" and may be said not to require any overt act on the part of the mortgagee—is not a matter which requires any decision now; for, in the present case, the words are "I shall be liable to pay." To that list may, however, be added the deci-

2. (1922) 25 Bom. L R. 203.
3. (1922) L.R. 50 I.A. 115· I.L.R. 4 Lah. 32· 44 M L.J 123 (P C).
4 (1921) L.R. 49 I.A. 9: I L.R. 44 A 121· 42 M.L J. 248 (P.C)
5. (1926) 52 M L J. 636
6. (1925) I.L R. 49 M 403 49 M.L.J. 394

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sion in *Sawmy Rao* v. *Official Assignee of Madras*,[7] in which the words are "whenever demanded." The case in *Kunjunni Nair* v. *Kunjunni Nair*[8] is not a case of mortgage. It strictly falls under Art. 75 of the Limitation Act and therefore I was not quite correct in saying in my former judgment that it was in conflict with the decision in *Gayadin* v. *Jhumman Lal*,[9] but this fact does not affect the rest of the judgment. Similarly the decision in *Sitab Chand Nahar* v. *Hyder Malla*[10] is a case in which the learned Judges considered the question of waiver and as it was found in that case that there was no waiver, they decided it against the plaintiff. It ought not to be grouped with the decision in *Gayadin* v. *Jhumman Lal*.[9] Leaving these two decisions aside, there still remains the main point to be discussed, namely, the conflict between the decision in *Narna* v. *Ammani Amma*[11] and the decision in *Gayadin* v. *Jhumman Lal*.[9] The question therefore arises whether these cases can be distinguished and, if not, which ought to be followed.

Mr. Sitarama Rao, relying on *Narna* v. *Ammani Amma*[11] argued that there is a general principle in all such cases according to which the obligee of the bond can waive the higher alternative offered to him on the happening of the obligor's default; and though in the case of Art. 75 such an option or right of waiver is cut down by the legislature it remains in the case of mortgage bonds which are governed by Art. 132. The learned Judges certainly seem to be of that opinion in the judgment in *Narna* v. *Ammani Amma*.[11] But, when the grounds of decision are examined, I am not satisfied with them even assuming the conclusion is correct. The first decision referred to by the learned Judges is *Astley* v. *Earl of Essex*.[12] That was a case of a forfeiture of a lease. It turned upon the construction of the words of the proviso in S. 4 of 3 and 4 Will. IV, c 27. The next case referred to was *Governors of Magdalen Hospital* v. *Knotts*.[13] The case went up on appeal to the Court of Appeal in *Governors of Magdalen Hospital* v. *Knotts*[14] and then to the House of Lords in *President and Governors of Magdalen Hospital* v. *Knotts*.[15] The learned Judges overlooked the fact that the case went up on appeal. The views taken by the Court of Appeal at page 725 and the House of Lords differed between

7. (1925) I.L.R 48 M 703 · 49 M.L.J. 474
8. (1911) 1 M.W.N 79
9. (1915) I.L.R. 37 A. 400 (F.B)
10. (1896) I.L.R. 24 C 281
11. (1916) I.L R. 39 M 981 31 M.L.J. 865
12. (1874) 18 Eq 290
13. (1876) 5 Ch D. 175
14. (1878) 8 Ch.D. 709.
15. (1879) 4 A.C 324.

themselves and differed from the view of Jessel, M. R., whose observations are therefore of no weight. The next two cases referred to, only for not being followed, are *Reeves* v. *Butcher*[16] and *Hemp* v. *Garland*.[17] As pointed out by the Allahabad High Court in *Shib Dayal* v. *Meharban*,[18] these cases are accepted law in England. *Vide* Hals. Vol. 19, p. 44.

I am not satisfied with the reason in *Narna* v. *Ammani Amma*[11] for not following them. Mr. Sitarama Rao referred to the case of *Davenport* v. *The Queen*.[19] This is a case of a lease of Crown lands. It was held that the forfeiture can be waived. At p. 128 it was observed that in construing clauses of forfeiture in leases declaring them void on breach of conditions by the lessee, they will be held voidable only at the option of the lessors. We then have got these observations:

> "The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract. See *Doe* v. *Bancks*,[20] *Roberts* v. *Davey*[21] and other cases in the *Notes to Dumpor's case*[22]."

Now I find that *Doe* v. *Bancks*[20] is also a case of a lease. *Roberts* v. *Davey*[21] is a case of a license which is akin to a lease. In the *Notes to Dumpor's case*[22] the only cases of other contracts which we are able to find are: (1) *Malins* v. *Freeman*.[23] That was discussed by Sir Montague Smith at page 129 in *Davenport* v. *The Queen*.[19] It was a case of an auction being voidable under the terms of a statute. (2) *Hughes* v. *Palmer*[24] and (3) *Hyde* v. *Watts*.[25] These two cases are cases of composition deeds and it was held that the contract was voidable at the option of the creditor with reference to the term in the contract. Now it seems to me that cases of forfeitures of leases and licenses and cases of voidable contracts stand on a somewhat different footing from the cases before us. In those cases the question is whether a party can avoid the lease or contract and fall back on his prior higher rights which were cut down by the contract of lease or composition. In the class of cases with which I am now dealing the question is not whether a person can avoid a contract but whether he has the option to take ad-

11 (1916) I.L.R. 39 M. 981: 31 M.L.J. 865.
16. (1891) 2 Q.B. 509. 17. (1843) 4 Q.B. 519.
18. (1922) I.L.R. 45 A 27 (F.B.) 19. (1877) 3 A.C. 115.
20. (1821) 4 B. & A. 401. 106 E.R. 984.
21. (1833) 4 B. & A. 664: 110 E.R. 606.
22. 1 Sm. L.C. 41.
23. (1838) 4 Bing. N C. 395: 132 E.R. 839.
24. (1865) 19 C.B.N.S. 393· 144 E.R. 839.
25. (1843) 12 M. & W. 254: 152 E.R. 1193.

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vantage of a clause giving him a higher right than the prior right existing. These are not cases of voidable contracts and it seems to me that both are not on the same footing. Mr. Sitarama Rao also referred to a decision in *James* v. *Young*.[26] That was a case of a sale in the Forest of Dean and it was held that the lease was voidable. North, J., quotes from a judgment of Blackburn and Mellor, JJ., in *Clough* v. *L. & N. W. R. Company*.[27] This extract contains a further quotation from Bramwell, B., in *Croft* v. *Lumley*.[28] After this second quotation is finished Lord Blackburn proceeds to observe: "In all this we agree, and think that, *mutatis mutandis*, it is applicable to the election to avoid a contract for fraud." Finally North, J., discusses the case before him with reference to these observations of Lord Blackburn. Now again we see that the cases discussed are, however, those of a forfeiture or a contract voidable on the ground of fraud. The observations I have already made apply to this. In my opinion, this case cannot help the case of the kind I am now discussing. The result is I am not able to agree with the reasons given in the judgment in *Narna* v. *Ammani Amma*[11] and to hold that there is any such general principle as contended for by Mr. Sitarama Rao.

The question then remains whether we can uphold the conclusion in *Narna* v. *Ammani Amma*[11] at least for other reasons. I find that the case has been followed in a number of cases in this Court, and, it seems to me, if there is a legal way of doing it, I ought to agree with the conclusions, if not, with the reasons.

It seems to me there is such a way. Where the contract contains terms of default, which fall within the scope of S. 74 of the Contract Act it is clear that the mortgagee has no right to enforce the terms as they are, for, the law declares that the Court can award reasonable compensation not exceeding the stipulation in the contract and when a party knows that he is not entitled to enforce the contract as it is but that the law enables the Court to meddle with it and give only a reasonable compensation, it stands to common sense to hold that the party himself may, to the best of his ability, lessen the rigour of the stipulation and try to find out what is reasonable or what a Court would award as reasonable and may himself insist on the contract only to that extent. To so hold is not in conflict

11 (1916) I.L.R. 39 M. 981, 31 M L.J. 865

26. (1884) 27 Ch.D. 652 at 661. 27. (1871) L.R. 7 Ex. 26

28. (1858) 6 H.L.C. 705.

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with the general principle of law that, if a man has got a bare cause of action he is not entitled to say:

"I will cut it up into parts or I would ignore the adverse act of the opposite party and wait for some time more to recognise the cause of action thus avoiding the bar of O 2, R 2, or of limitation."

We are not now dealing with a case of a bare cause of action but a case where, first, there is one right for which the cause of action has accrued and then in the alternative on the happening of a default, a higher right was stipulated for in the document but which under the law a Court is entitled to interfere with. In such cases the general principle does not apply, and it seems to me that the party himself can exercise his discretion and choose to insist on the performance of a lesser thing than that stipulated in the contract. The question whether he should exercise it soon after the default or can disclose his choice only in the final suit does not arise in this case, for, in the case before us he has clearly stated his choice in the first suit which was filed immediately after default. I have already quoted from the plaint in that case. Mr. Bhashyam Aiyangar for the respondents argued that he must either accept the whole clause on default or reject it altogether. In the present case, he chose to claim 10 per cent. after default in the first suit. But I am not able to accept this argument. All that the plaintiff claims to do in such a case is to find what is reasonable, to find out if possible what the Court itself would have done. In the present case, he said:

"I do not want to rely upon the clause relating to the calling of the other instalments But I want to rely upon 10 per cent interest from the date of default."

On principle I do not see any reason why he should not do this and why he should accept and reject both together. This is also the view taken by our brothers Kumaraswami Sastriar and Curgenven, JJ., in *Sivasubramania* v. *Nagappa*.[5] To this extent I agree with it. The result is that I hold that, in all cases where the clause is penal and is governed by section 74 of the Contract Act, the mortgagee has an option and I confine such option to such cases only. The decision in *Narna* v. *Ammani Amma*[11] would, according to such a view, be correctly decided and it would not then be in conflict with the decision in *Gayadin* v. *Jhumman Lal*[9] in which there is no penal clause but merely a clause providing that in default of the payment of one instalment

5 (1926) 52 M.L.J. 636.
9 (1915) I.L.R. 37 A. 400 (F.B.)
11 (1916) I.L.R. 39 M. 981: 31 M.L.J. 865.

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all the instalments become due. Such a clause is not penal as shown by one of the illustrations to section 74. On this ground I would hold that the present suit is not barred under O. 2, R. 2. Whether the same principle applies to a case of chit fund is a different matter, for, it is sometimes said that the terms in a chit bond should be strictly enforced. Vide *Vaithianatha Aiyar v Govindaswami Odayar.*[29] On the other hand, it is sometimes said, even the terms of the chit bond may be penal. *Vide* Judgment of V.V. Srinivasa Aiyangar, J., in *Ramalinga Adaviar* v. *Meenakshisundaram Pillai.*[30] Whether the decision of myself and my learned brother Jackson, J., in *Mukyaprana* v. *Kelu Nambiyar*[1] should be regarded as correctly decided depends on the peculiar nature of the chit fund contract. That difficulty does not arise here. In the present case, undoubtedly the terms are penal and the party exercises his judgment in finding out what is reasonable.

Mr. Sitarama Rao has referred to a number of cases relating to construction of compromise decrees. I think it is safer to keep the cases of decrees apart and to deal with them on a different footing and not to import principles of construction in the case of decrees and apply them to cases of bonds. So I abstain from dealing with them.

Mr. Sitarama Rao argued that the suit is not barred under Order 2, Rule 2 on another ground. He relied on *Narasinga Rau* v. *Venkatanarayana*[31] and *Subba Rao* v. *Rama Rao.*[32] The latter decision was on the Act of 1859 and it is safe to ignore it. The decision in *Narasinga Rau* v. *Venkatanarayana*[31] receives some support from the observations of Lord Buckmaster in *Kishen Narain* v. *Pal Mal*[3]:

> "If, therefore, the plaint originally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the appellant's case would be on surer ground"

These observations were also given effect to by my Lord the Chief Justice and Krishnan, J., in *Sawmy Rao* v. *Official Assignee of Madras.*[7] But in the present case the former suit was not on a mere personal covenant but for the sale of the property. I do not think therefore the contention of Mr. Sitarama Rao can be sustained. The result is I would allow the appeal on the other ground only and decree the suit with costs

1. A.I.R. 1928 Mad. 705
3. (1922) L.R. 50 I A. 115: I.L.R 4 Lah 32: 44 M L.J 123 (P C).
7 (1925) I.L.R. 48 M 703: 49 M.L.J 474
29. (1921) 42 M.L.J. 551
30. (1924) 47 M.L J. 833
31. (1892) I.L.R. 16.M. 481.
32 (1867) 3 M.H.C.R. 376.

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throughout. The usual mortgage decree will issue. Time for redemption 15th July, 1929.

The memorandum of objections is dismissed but without costs.

I agree with my learned brother that this is a matter suitable for amendment of Order 2, Rule 2, Civil Procedure Code, or Art. 135 of the Limitation Act, or, both.

Venkatasubba Rao, J.

Venkatasubba Rao, J.—This appeal raises a question of some importance in regard to the application of O. 2, R. 2, Civil Procedure Code. The suit is based upon a mortgage bond, dated 31st May, 1918. The sum secured by it is Rs. 5,000 to be repaid with interest at 8 per cent. in four annual instalments in the following manner:

	Rs.
Interest at 8 per cent. on Rs. 5,000, *viz.*, Rs. 400 *plus* the first instalment of principal Rs. 1,250 ..	1,650
Interest, *viz.*, Rs. 300 on the balance of principal Rs. 3,750 *plus* the second instalment of principal Rs. 1,250	1,550
Interest, *viz.*, Rs. 200 on the balance of principal Rs. 2,500 *plus* the third instalment of principal Rs. 1,250	1,450
Interest, *viz.*, Rs. 100 on the balance of principal Rs 1,250 *plus* the last instalment of principal ..	1,350

Then comes the important clause which is to the effect that in default of payment of any instalment, the whole amount shall become due and in that case the rate of interest shall be 10 per cent. on the arrears then due and on the amount subsequently payable. The actual words in the bond are:

"The provision in regard to the payment by instalments shall in that event become cancelled"

The same idea is again but differently expressed in the next clause, which runs thus:

"You are entitled to collect the amount from me in that manner."

The 1st defendant, the mortgagor, failed to pay the first instalment. The plaintiff thereupon instituted O.S. No. 404 of 1919 in the District Munsif's Court of Mangalore for the recovery of Rs. 1,700 made up of Rs. 1,650 mentioned above and Rs. 50 interest at 10 per cent. on the said sum from the date of default, namely, 1st June, 1919. The suit was filed on the 24th of September, 1919 and there was the usual prayer in the

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plaint for the sale of the mortgaged property. Paragraph 4 of that plaint is very important and reads thus:

"Though the whole amount of the mortgage money has become payable by reason of the default of the defendant, the plaintiff waives the benefit of the provision in the bond and reserves his right to sue the defendant separately should he commit default in the payment of the subsequent instalments."

The decree that was passed in the case recognised this reservations for it said:

"The sale shall be held subject to the payment of the balance of principal and interest due under the suit bond"

The mortgagor did not make a single payment subsequently and in the present suit the plaintiff seeks to recover the balance due to him under the bond. The 2nd defendant purchased the suit properties subject to the mortgage and in the sale-deed in his favour there is an express mention of the amount due to the plaintiff.

There is no defence on the merits. The 2nd defendant pleads that the present suit is barred by reason of the previous suit under Order 2, Rule 2, Civil Procedure Code. The Lower Court has upheld the defendant's contention and the plaintiff has filed this appeal.

The question resolves itself into this: When does the right to sue accrue? This at once raises the point, when does the statute begin to run, under Art. 132 of the Limitation Act, from the date of the first default, or, from the date when the money becomes due under the main contract? for, in my opinion, the question presents itself in the same form, whether in regard to Order 2, Rule 2, Civil Procedure Code or Art. 132 of the Limitation Act, as it is obvious that in either case the same principle applies. The Code enacts that every suit shall include the whole of the claim which the plaintiff is entitled to make and if he omits to sue in respect of any portion, he shall be debarred from afterwards suing for it. The words used in Art. 132 are:

"When the money sued for becomes due." The two sets of expressions "when does the plaintiff become entitled to the money?" (used in the Code) and "when does the money become due?" (used in the Limitation Act) are for the present purpose indistinguishable. In my opinion, therefore, the Courts have rightly referred to the same principle, whether a particular case raised a question under the Code or under the Limitation Act. I may mention that on the point we have to decide, there is a conflict of judicial opinion, the Madras cases favour-

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ing the appellant's contention and the Allahabad decisions generally supporting the contrary view. In short, the question we have to decide is, which of these two views is the more acceptable one? After listening to very full arguments, I have come to the conclusion that the view taken by our Court is not only the more just but the sounder view and I find no reason to depart from it especially, when I find that it has been adopted almost without dissent in numerous decisions ranging over a long period. Let me now examine the cases. *Badi Bibi Sahibal* v. *Sami Pillai,*[33] decided so long ago as 1892 by Muthuswami Aiyar and Best, JJ., held that section 43 of the Civil Procedure Code of 1882 did not bar a second suit where the plaintiff had previously sued for the first year's interest under a bond containing a default clause. The learned Judges observe:

> "The alternative provision in Ex. A is one that was inserted for the exclusive benefit of the plaintiff He had, therefore, an option to sue either for the first year's interest only, or for the same, together with the principal amount. It was only necessary that he should manifest his intention of waiver by some overt act which could not be recalled . . . . The real test appears to us to be not whether the option was exercised with the privity of the defendants, but whether it was so exercised as to determine the plaintiff's *locus penitentiae* "

The next case that deals with the point is *Perumal Aiyan* v. *Alagirisami Bhagavathar,*[34] a case on limitation, where a different view was taken; but this was distinguished in *Nettakaruppa Goundan* v. *Kumaraswami Goundan.*[35] The last mentioned case was followed in *Narna* v. *Ammani Amma,*[11] which, in my opinion, states the principle correctly, although (as has been shown by Mr. Bhashyam Aiyangar, the learned counsel for the respondents) the English cases cited in the judgment are not quite in point. The fact is, as I shall show presently, that the principle adopted in that case is that recognised in English cases of great authority. The distinction between a right and a privilege is of fundamental importance and this must not be overlooked in construing the word "entitled" in Order 2, Rule 2. The plaintiff, that rule says, is bound to include the whole of the claim which he is entitled to make, in other words, to which a right has accrued. The point then is, before the first suit was filed, did a right accrue to him to demand the whole amount? The matter may be put somewhat thus: The plaintiff has an option to enforce the clause or not at his pleasure. It is open

11. (1916) I.L.R. 39 M. 981: 31 M.L.J. 865.
33. (1892) I.L.R. 18 M. 257.
34. (1896) I.L R. 20 M. 245: 7 M.L.J 222.
35. (1898) I.L.R. 22 M. 20: 8 M.L.J. 167.

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to him to avail himself of that option or to waive it and there is a third alternative, namely, it is equally open to him not to make election. He may by act or word show that he elects to avail himself of the benefit, and then he determines his election for ever. He may similarly indicate that he waives the option, and in that case again he cannot afterwards change his mind. Then there is the third alternative, where he makes no election, retaining the right either to exercise the power or to waive it—and this he may retain till the suit is filed. Construing O. 2, R. 2 in the light of this principle, it cannot be said of a person, that on the date of the first suit he became entitled to sue for the whole amount, unless he had previously elected by some word or act to take advantage of the default clause. If he had previously done nothing, that is, had made no election, the act involved in bringing the first suit for a single instalment amounts to a waiver on his part of the benefit reserved under that clause. If again, after the default has occurred, he keeps the question open and does nothing, but finally sues for the whole amount, the fact that he has so sued, shows that he has waived the benefit reserved to him under the contract. With great lucidity, these principles are stated by Lord Blackburn in *Clough* v. *London and North Western Railway Company*,[27] the relevant passage from whose judgment is quoted by North, J., in *James* v. *Young*.[26]

Although in *Narna* v. *Ammani Amma*[11] these cases were not referred to, it is the principle that was recognised in them that was applied. The contention that was urged in that case was, that it must be shown under Art. 132, just like under Art. 75, that the payee waived the benefit of the provision. The learned Judges negatived this argument refusing to import into Art. 132 words to be found only in Art. 75. Another contention which does not seem to have been advanced must also be taken to have been necessarily and by implication repelled by the judgment in that case. That contention is, that while waiver is expressly mentioned in Art. 75, omission to refer to it in Art. 132, indicates the intention of the legislature, to deny altogether a right of waiver under the latter articles. I have discussed at this length the effect of *Narna* v. *Ammani Amma*,[11] as it is recognised as an authority on the point in almost every subsequent case. In some cases, a distinction was attempted on the ground that the words by which the option was reserved contained expressions such as "if you require" or "on demand." In my opinion this is a distinction

11. (1916) I.L R. 39 M 981: 31 M.L.J 865.
26. (1884) 27 Ch.D. 652. 27. (1871) L.R. 7 Ex 26.

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without a difference, for the meaning is not altered by the addition of these words. When it is said that a person has a certain power, it means only that, if he so requires it, he may exercise that power. These words thus being necessarily implied in the general words by which the option is reserved, it makes little difference whether they are present or not. It remains only to add in regard to *Narna* v. *Ammani Amma*[11] that the learned Judges preferred to agree with the view taken by Bannerjee, J., in his dissenting judgment in *Gayadin* v. *Jhumman*[9] and refused to follow the two English cases *Reeves* v. *Butcher*[16] and *Hemp* v. *Garland*,[17] which, in passing, I may note, construed language somewhat different of the English Limitation Act. *Narna* v. *Ammani Amma*[11] was refused to be re-considered in unreported Appeal No. 27 of 1916 by a Bench of this Court. That a mortgagee is not bound to take advantage of his debtor's default is again affirmed in *Ramadh Bibi* v. *Kandasami*[36] (*see* the judgment of Spencer, J.).

Krishnan, J., observes in the same case:

"It is not alleged that the mortgagee made any demand for his money before the due date He apparently did nothing either to take advantage of his option or on the other hand to waive his right to do so. It seems to me that, when a due date is fixed and an option is given to a creditor to change it, it will be unreasonable to presume that he did change it, when he did nothing at all to produce that effect . . . If there is evidence that he (the plaintiff) did exercise his option the position is clear; but in the absence of such evidence, I am not prepared to make any presumption to his prejudice"

With respect, it seems to me that the position is very clearly stated in this judgment. In that case, a further point was taken that the plaintiff should be deemed to have exercised his option by suing for compound interest and that argument was also rejected. It is also noteworthy that in the bond in that suit occurred the words "when you require" but that the judgment did not proceed on that ground. The other cases which have taken the same view are *Lachakkammal* v. *Sokkayya*,[37] *Kaliappa* v. *Sami Aiyar*,[38] *Velliappa* v. *Venkatasubbarayulu*,[6] *Mohideen Kariya Pulavar* v. *Periyanayakam Pillai*[39] and *Sivasubramania* v. *Nagappa*.[5]

Of these cases, I need refer to only two in some detail. *Sivasubramania* v. *Nagappa*[5] is a decision under O. 2, R. 2,

5 (1926) 52 M.L J. 636.
6 (1925) I.L.R. 49 M. 403: 49 M L.J. 394.
9. (1915) I.L.R. 37 A 400 (F.B).
11. (1916) I.L.R 39 M. 981: 31 M.L.J. 865.
16. (1891) 2 Q.B. 509.
17. (1843) 4 Q.B. 519.
36. (1917) 9 L.W. 479.
37. (1918) M.W.N. 586.
38. (1921) M.W.N. 384.
39. A.I.R. 1925 Mad 233.

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Civil Procedure Code, and the previous cases on the point which I have cited were followed. In *Velliappa* v. *Venkatasubbarayulu*[6] the learned Judges observed that they would follow the decisions of this Court in preference to the Allahabad cases. *Shib Dayal* v. *Meharban*[18] was not referred to in the judgment but it merely affirms the previous cases of that Court. The only Madras case which has taken a different view is *Mukyaprana* v. *Kelu Nambiyar.*[1] That was a case under O. 2, R. 2, and Jackson, J., seems disposed to take the view, that the principle applicable under that provision is different from what applies under the Limitation Act. With the greatest respect, as I have already said, I am unable to agree with this proposition. I need scarcely refer to the cases cited by Mr. Sitarama Rao, dealing with instalment decrees.

The learned Subordinate Judge in deciding against the plaintiff has purported to follow two decisions of the Privy Council which he has completely misread and neither of which is applicable. In *Muhammad Hafiz* v. *Muhammad Zakariya,*[3] the three years mentioned in the deed had elapsed before the first suit was brought, so that the whole amount had become then due. This fact is clearly pointed out in the judgment itself. (*See* p. 11). Similarly in *Kishen Narain* v. *Pala Mal,*[3] the first suit was brought in 1908 more than two years after the entire amount had become payable. (*See* judgment at page 118). Lastly, I may refer to two other decisions of the Judicial Committee, which cannot be treated as authorities on the point, the question having been left open, although the observations of their Lordships tend rather strongly to support the view I am taking—*Juneswar Dass* v. *Mahabeer Singh*[40] and *Pancham* v. *Ansar Husain.*[41]

I am therefore inclined both on principle and on authority to hold that the suit is not barred under Order 2, Rule 2, Civil Procedure Code, in the present case, the plaintiff, as I have said, expressly waived the benefit, but—and that is the point I want to stress—all that the creditor need show is, that he had not elected to take advantage of the default clause.

In view of the great importance of this question and the conflict of opinion on this point, it is extremely desirable that

1. A.I.R. 1928 Mad. 705.
3. (1922) L.R. 50 I.A. 115 I.L R. 4 Lah. 32: 44 M.L J. 123 (P C).
4. (1921) L R. 49 I.A. 9: I.L.R. 44 A 121: 42 M L.J 248 (P.C).
6 (1925) I.L R. 49 M. 403· 49 M L.J. 394.
18 (1922) I.L.R. 45 A. 27 (F.B.).
40. (1875) L.R. 3 I A. 1. I.L.R. 1 C. 163 (P.C).
41. (1926) L.R. 53 I.A. 187: I.L.R. 48 A. 457 (P.C).

Art. 132 of the Limitation Act should be so amended as to set the matter at rest. The Judges who felt constrained to hold that the statute runs from the first default, recognised the injustice involved in it. (*See*, for instance, the judgment of Fry, L.J., in *Reeves* v. *Butcher*,[16] who observes:

"We have not to determine whether the defence here set up is handsome or conscientious, but whether it is good at law."

It further follows that, in my opinion, it is desirable that Order 2, Rule 2, Civil Procedure Code, should be also similarly amended.

In the result, the judgment of the Lower Court is set aside and a decree is passed in favour of the plaintiff for the amount claimed with costs throughout.

As regards the time for redemption and the memorandum of objections, I agree with the order passed by my learned brother.

A.S.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER.

Suban Sahib and others .. *Petitioners** (*Accused*).

Indian Evidence Act (I of 1872), S. 54—Indian Penal Code, S 75—Criminal Procedure Code, S. 562—Previous convictions of accused—Admissibility in awarding sentence.

The object of S. 54 of the Evidence Act is not to lay down that previous convictions of the accused may not be taken into account in passing sentence, and consequently, previous convictions can be used by the Court in exercising its discretion in regard to the quantum of the sentence.

Emperor v. *Ismail Ali Bhai*, (1914) I L.R. 39 Bom 326 followed.

The proper application of section 75 of the Penal Code is to cases where it is intended to pass sentences more severe than those provided in the Penal Code for the particular offences charged, and it does not involve a complete exclusion from consideration of previous convictions in cases where it is not intended or possible to exceed the limits fixed by the Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Trichinopoly Division, in Criminal Appeal No. 8 of 1928, preferred against the judgment of the Court of the Sub-divisional Magistrate of Trichinopoly in C.C. No. 114 of 1927 (Criminal Complaint No. 7 of 1927 on the file of the Town Sub-Magistrate of Trichinopoly).

M. S. Vaidyanatha Aiyar for petitioners.

K. S. Vasudevan for *The Public Prosecutor* on behalf of the Crown.

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*Cr.R.C. No. 278 of 1928. 29th October, 1928.
(Cr.R.P. No. 222 of 1928.)

16 (1891) 2 Q B. 509.

Suban Sahib, *In re.*

The Court delivered the following

JUDGMENT.—The four petitioners with another person not before me were charged before the Town Sub-Magistrate, Trichinopoly, with offences under sections 147, 323, 379 and 426, Indian Penal Code. The last witness was examined by him on 7th October, 1927. He then wrote out a long order finding the petitioners and the other man guilty of offences under Ss. 147, 323 and 426, Indian Penal Code. Having arrived at that conclusion, he proceeded to record evidence which proved that two of the petitioners had previously been convicted of breach of the peace, had been bound over to keep the peace for a year and had broken their bonds. On the strength of this evidence, he sent up the case to the Sub-divisional Magistrate, being of opinion that two of the petitioners should receive a severer sentence than he could impose and that the other two should be bound over to keep the peace. The Sub-divisional Magistrate, after considering the evidence, convicted the petitioners of rioting and other offences. In view of the evidence as to their association together and the previous convictions of two of them, he decided to take action under Madras Act V of 1926. Evidence was given that the petitioners were not more than twenty years old and he ordered them to be detained in the Borstal School at Tanjore for the minimum period of two years. An appeal was taken to the Sessions Judge, who set aside the convictions for rioting, but confirmed the sentences.

In revision, it is argued that the trial was vitiated by the admission of evidence of the bad character of two of the petitioners before the Sub-Magistrate. It is contended that this is opposed to the provisions of section 54 of the Evidence Act and that the only method by which sentences can be enhanced is to be found in section 75, Indian Penal Code. The wording of section 54 of the Evidence Act is, no doubt, as wide as it can be, but the object is, I think, clear—to lay down that evidence of bad character, including a previous conviction is, as a rule, irrelevant "to help to establish an accused person's guilt"; but that is not to lay down that it may not be taken into account in passing sentence. The question has been fully considered in *Emperor* v. *Ismail Ali Bhai*,[1] a decision which I propose to follow.

The proper application of section 75, Indian Penal Code, seems to me obvious. It is to cases where it is intended to pass sentences more severe than those provided in the Penal Code for the particular offences charged. But that does not involve

1. (1914) I.L.R. 39 B 326

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a complete exclusion from consideration of previous convictions in cases where it is not intended or possible to exceed the limits fixed by the Penal Code. In very few cases are minimum sentences provided for and the Judge has a wide discretion allowed him. It seems to be impossible to contend that, after conviction, he is disentitled, from considering, with a view to the proper exercise of that discretion, the antecedents of the convicted man. If there could be any doubt on the point, it is, I think, set at rest by section 562, Code of Criminal Procedure. That section refers to a far wider range of offences than are included in section 75, Indian Penal Code, and distinctly contemplates the use of previous convictions (not necessarily convictions for the same offence of which the person has just been convicted) to affect the question of sentence. If it is legal to prove a previous conviction in order to show that a convicted person cannot avoid being sentenced, I see no reason why previous convictions should not be used by the Court in exercising its discretion in regard to the quantum of the sentence.

I find no ground for interference. The Criminal Revision Petition is dismissed.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Perianambi Srirangachariar .. *Petitioner**

v.

Narasimha Aiyar and others .. *Respondents.*

Perianambi Srirangachariar *v.* Narasimha Aiyar.

Provincial Insolvency Act (V of 1920), S 24—Application by debtor to be adjudicated an insolvent—Proof that he is unable to pay his debts—Nature of proof required—Debtor owning properties more than the value of debts—Effect—Nature of enquiry to be held by the Court—Suppression of prior insolvency proceedings or properties by the debtor—If can be gone into by the Court during the enquiry

The proof that is required of a debtor, who files an application to be adjudicated an insolvent, that he is unable to pay his debts, is only a *prima facie* proof. The mere fact that the debtor has got properties, the value of which is more than that of his debts, is no ground for holding that he is able to pay his debts, as the debtor may be unable to raise money to pay his debts. If the debtor has no assets or if his property cannot be converted into money, his statement that he is unable to pay his debts must be accepted as true, unless the Court has reason to think that all his debts are fictitious debts and that he is making the application with ulterior motives.

Narayanappa v. *Bheemappa,* (1925) 24 L.W. 219 followed.

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*C.R.P. No 1669 of 1927. 24th April, 1928.

Perianambi Sriranga-charar v. Narasimha Aiyar.

In holding an enquiry under section 24 of the Provincial Insolvency Act, the Court is not entitled to consider whether the debtor has committed acts which would make him liable under the penal provisions of the Act as his suppression of prior insolvency proceedings or of his properties. Such acts of the insolvent which may offend against the provisions of the Act should be considered when the debtor comes up for his discharge

Petition under section 75 of the Provincial Insolvency Act praying the High Court to revise the order of the District Court of Madura, dated 25th November, 1927 and passed in C.M.A No. 107 of 1927 preferred against the order of the Court of the Subordinate Judge of Madura, dated 19th September, 1927 and passed in Insolvency Petition No. 104 of 1926.

K. Rajah Aiyar for petitioner.

K. V. Sesha Aiyangar for respondents.

The Court delivered the following

JUDGMENT.—This is an application to revise the order of the District Judge of Madura dismissing the appeal of the petitioner against the order of the Subordinate Judge declining to adjudicate him an insolvent. The learned Judge has held that it has not been shown that the petitioner was unable to pay his debts. When a debtor files an application to be adjudicated an insolvent under section 24 of the Provincial Insolvency Act, he has to show that he is unable to pay his debts. But the proof that is required is only a *prima facie* proof, for proviso to section 24 (*a*) provides that

"Where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same."

The mere fact that the debtor has large properties is no ground for holding that he is able to pay his debts. A man may have property but he may be unable to raise money to pay his debts and therefore the Court is not entitled to come to the conclusion that the man is unable to pay his debts because he has got properties the value of which is more than that of his debts he has to pay. This point was decided so long ago as 23rd September, 1925, in a case reported in *Narayanappa* v. *Bheemappa*.[1] In holding an enquiry under section 24 a Court is not entitled to consider whether the debtor has committed acts which would make him liable under the penal provisions of the Insolvency Act. In this case two issues were raised, issues Nos. 3 and 4, by the Subordinate Judge, which are as follows:—

(3) "Is the petition bad on account of the suppression of prior insolvency proceedings?

(4) Have the petitioners suppressed any of their assets?"

1. (1925) 24 L.W. 219

These are not germane to the enquiry which a Court ought to hold under section 24. The fact that the petitioner has not brought to the notice of the Court all his property is no ground for holding that he is able to pay his debts. I think the consideration of these two issues has materially prejudiced the Subordinate Judge in the disposal of the case for in paragraph 10 he remarks:

"In this case the debtors having suppressed a major portion of the properties, it is impossible for me to find that they are unable to pay their debts."

The learned District Judge also refers to this fact in his judgment and observes:

"In the present case the learned Subordinate Judge has given excellent reasons for holding that the appellants omitted from their petition many properties which really belonged to them"

I think this fact has materially affected the judgment of both the Lower Courts and that being so, they are vitiated by a consideration of circumstances which ought not to be considered when a debtor's petition is being heard under section 24 of the Insolvency Act. Any act which offends against the provisions of the Insolvency Law should be considered when the debtor comes up for his discharge and if he is guilty of any offence mentioned in the Act he should be proceeded against according to law. When a debtor comes forward and says that he is unable to pay his debts, the Court has to satisfy itself whether he is unable to pay them and if he has assets or if his property cannot be converted into money, the statement of the debtor that he is unable to pay his debts must be accepted as true unless the Court has reasons to think that all his debts are fictitious debts and that he is making the application with an ulterior motive.

If the Court finds that the debtor has a strong motive to allege falsely that he is unable to pay his debts, the Court may hold that the proof is not sufficient; in other cases, the Court will be well advised in accepting the statement of the debtor. I set aside the judgment of the Lower Courts and direct the Subordinate Judge to restore the application to file and dispose of it in the light of the remarks made herein.

Costs of this application will be provided for in the order of the Sub-Court.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY.

Ramalinga Odayar .. *Petitioner** (*Accused*).

Ramalinga Odayar, *In re.*

Criminal Procedure Code (V of 1898), Ss. 228 and 231—Alteration of charge—Defence not affected by the alteration—Right of accused to re-call prosecution witnesses

The provisions of section 231 of the Criminal Procedure Code are applicable to cases to which section 228 applies and, consequently, the accused is entitled to re-call the prosecution witnesses after the alteration of the charge even if the alteration cannot affect his defence, and the Magistrate has no discretion in the matter.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional District Magistrate of Tanjore, dated 26th May, 1928 and passed in Calendar Case No. 10 of 1928.

V. L. Ethiraj, K. S. Desikan and *M. Ranganatha Sastri* for petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER.—I do not agree with the Additional District Magistrate that the provisions of section 231 of the Code of Criminal Procedure are inapplicable to cases to which section 228 applies. Under section 231 of the Code of Criminal Procedure the accused had the right to re-call prosecution witnesses after the alteration of the charge even if that alteration could not affect his defence, as the Magistrate supposes, and the Magistrate had no discretion in the matter. The witnesses whom the accused wishes to re-call will be re-called.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Para Subba Naidu and three others .. *Petitioners* (*Accused*).

Para Subba Naidu, *In re.*

Criminal Procedure Code (V of 1898), S 197—Madras Village Courts Act (I of 1889), S. 48—Village Munsif executing decree—If a "Judge"—Sanction before his prosecution—If necessary

A Village Court executing, under section 48 of the Madras Village Courts Act, a decree by way of distraint is a Village Court as defined in the Act and the Village Munsif, if he himself distrains, is still acting as Judge of that Court Consequently, sanction for his prosecution is necessary under section 197 of the Criminal Procedure Code

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*Cr.R.C. No. 471 of 1928. 20th September, 1928.
(Cr.R.P. No 383 of 1928.)

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Rajampet, dated 8th October, 1928, and made in C.C. No. 344 of 1928.

G. Krishnaswami Aiyar for petitioners.

N. S. Mani for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—It must be held that a village Court executing under section 48 of Act I of 1889, a decree by way of distraint is a village Court as defined in the Act, and the village munsif if he himself distrains is still acting as Judge of that Court. Therefore, sanction for his prosecution is necessary under section 197 of the Code of Criminal Procedure.

The petition is therefore allowed as regards accused No. 2.

N.S. *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT:—LORD PHILLIMORE, LORD CARSON AND SIR LANCELOT SANDERSON.

The Deputy Commissioner of Bara Banki, Manager of the Estate of Chaudhri Mujtaba Husain .. *Appellant**

v.

The Receiver in Bankruptcy of the Estate of Chaudhri Shafiq-uz-zaman and others .. *Respondents.*

Arbitration—Arbitrators—Authority of—Will—Interpretation of—Disputes as to—Reference in regard to—Award—Binding nature of, on parties and representatives—Construction of award—Estate conveyed under award—Absolute or not—Widow and brother of deceased Mahomedan—Disputes between, as to proper construction and effect of deceased's will—Award settling, and dividing properties between, widow and brother—Estate taken by widow in properties allotted to her—Custom—Inheritance—Family custom of—Attaching to estate of—Modes of—Breach of custom—Cession of immediate heir in favour of next heir if amounts to—Breach in a particular instance—Effect of, not to destroy custom—Oudh Estates Act, 1869, S. 8—List 2 of Act—Estate entered in—Succession to—Family custom of—Existence of—Inquiry into—Propriety—Ss. 15 and 13 (1)—Claimants referring disputes to arbitration—Award granting portion of estate to claimant not entitled under the Act—Effect—Transfer of Property Act, S 41—Ostensible owner—Holding out of a person as—Evidence of—Transferee acting in good faith—Purchaser from—Good faith on part of—Necessity.

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*P.C. Appeals Nos 113 and 114 of 1926. 21st May, 1928.

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However much an award may be complained of by a stranger to the submission or his representatives, it cannot be rejected by a party to the submission or those representing him; and the representatives of a party to the submission are equally entitled to avail themselves of the benefit conferred upon him by the award.

An Oudh talukdar possessed of talukas entered in Lists 2 and 5 of the Lists of the Oudh Estates Act, 1869, died leaving a will by which he bequeathed the said taluks in the manner stated therein to his brother, widow, and daughter and her male issue After his death disputes arose between his widow and his brother, and they referred their disputes with reference to the properties dealt with by the will and with reference to other properties of the deceased to the arbitration of certain persons, authorising them to settle the disputes after perusing the clauses given in the will and considering other matters. The arbitrators ultimately made an award which awarded some of the taluks to the widow, and divided the other properties of the deceased in a certain way.

Held that, upon the true construction of the award, the brother was entirely excluded from any interest in the property awarded to the widow, and that at any rate, as far as he was concerned, the widow must be taken to have got the absolute ownership of the property awarded to her.

Held further, that the arbitrators must be deemed to have had full authority to put such interpretation on the clauses of the will as they thought proper.

Held also that, with regard to the succession of the widow, the effect of the will and of the award was to bring into operation S 15 of the Oudh Estates Act, and to take the property out of the limitations or entail prescribed by that Act, because the brother and not the widow was the person who would have conformed to sub-section 1 of section 13 as the only qualified legatee, and a daughter was no heir at all under the Act

The taking of an estate out of the statutory entail does not *per se* render inoperative a statement made in the Act that the particular estate descended by custom in a particular manner.

A family custom of descent may attach to an estate in one of two ways. There might be a custom applicable to all descendants from some common ancestor in respect of all estates, or the custom might be limited to the capital or principal estate, as, for instance, where there is a gaddi

The talukdar, *S*, is entered in List 2 of the Oudh Estates Act, 1869, in respect of these very talukas, and it is declared by S. 8 of the Act that as to these very estates there is a family custom (not created by the Act but recited in the Act) by which these talukas descend to a single heir. As to these talukas the Act renders an enquiry as to the existence or otherwise of a family custom of descent idle.

The breach of a family custom of descent in a particular instance need not destroy it for all time. The cession of the immediate heir in favour of the next heir cannot be deemed to make a breach in the custom.

The sister, and the representatives of another deceased sister of *S*, a Mahomedan, claimed against him and his transferees shares in the suit property as having descended from their mother according to the rules of Mahomedan Law. The mother died in 1907, and soon after her death possession was taken of her entire estate on behalf of her son *S* by the Court of Wards. A year after the Court of Wards released the estate to *S*, and the suit was instituted only about seven years later. Both the sisters had husbands who were well aware of the state of the family and of the descent of the property and of such claims as they might have to share in the succession. The sisters, and after the death of one, her representatives were receiving allowances from the Court of Wards, such as are usually

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made to junior branches when the estate vests in one heir. They were not also entirely ignorant of the way in which *S* was encumbering the estate.

Held, that the facts set out above satisfied the first condition of S. 41 of the Transfer of Property Act and that *S* must be deemed to have been allowed to be the ostensible owner of the property with the implied consent of the plaintiffs.

Where a mortgagee takes a mortgage of property from its ostensible owner after taking reasonable care to ascertain that the "transferor had power to make the transfer" within the meaning of S. 41 of the Transfer of Property Act, purchasers from the mortgagee under arrangements made for realising facts of the property in order to discharge part of the mortgage, must equally be held to have taken reasonable care.

Appeals Nos. 113 and 114 of 1926 from a judgment and decree, dated the 13th April, 1923, of the learned Judicial Commissioners of Oudh (Messrs. Kanhaiya Lal and Dalal).

The case in the Court below is reported in *Zarif-un-nisa* v. *Shafiq-us-saman.*[1]

Dunne, K.C., Hyam and *Jopling* for appellant.

De Gruyther, K.C. and *Dube* for respondent No. 4.

Abdul Majid for respondents Nos. 5 and 15.

Lowndes, K.C. and *Wallach* for respondents Nos. 9, 10, 11 and 14.

Their Lordships' judgment was delivered by

Lord Phillimore.

Lord Phillimore.—One Sarfaraz Ahmad, talukdar of Oudh, was possessed of the talukas of Khanpur and Sikandarpur and Bhilwal with Hasanpur. His name was in List 2 of the Oudh Estates Act, 1869, in respect of Bhilwal and Khanpur and in List 5 in respect of Sikandarpur. He died in 1870, having made a will which, however, was not executed or registered sufficiently long before his death to be protected by the exception in section 13 of the Act, and which would, therefore, be only operative in respect of legacies to persons qualified by the earlier paragraphs of the same section. He left surviving him a brother, Murtaza Husain, a widow, Bechan-un-nisa, and a daughter, Zainab-un-nisa, who was married, and had a young son, who was alive at the time of the testator's death. He purported to deal with the talukdari estates in the following terms:—

"The taluka Hasanpur and Bhilwal in Pargana Haidergarh and the taluka Khanpur in Pargana Subeha, which are ancestral and hereditary, and the taluka Sikandarpur in Pargana Simrautha, granted by the Government, are in my proprietary possession and occupation without the coparcenership of any one; and under the sanad granted by the Government, I have every power to mortgage, sell, gift and transfer (the same) Therefore,

1. (1923) 75 I.C. 626: 26 O.C. 133.

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after me, the settlement be made, in the first place, with my wife, Musammat Bibi Bechun, after her, with my daughter, Musammat Zainab-un-nisa, and after her, with her issue, whether male or female, and my brother Murtaza Husain in respect of each taluka, as it is recorded, according to the detail given herein (and they) be considered owners and successors in my place.''

Then follow certain special directions concerning the properties; of which the material portions are as follows:—

''Taluka Bhilwal, Hasanpur, etc—This Ilaqa was acquired by my father-in-law, Chaudhri Lutf-ul-lah, without any coparcener. After me, the owner thereof will be my wife Musammat Bibi Bechun. The settlement and the *lambar* thereof should stand in her name. After her, Musammat Bibi Zainab-un-nisa, her only daughter, will be the owner and successor, and after her, her issue, whether male or female. The male issue should be the Lambardar and representative and the daughters be entitled to maintenance.''

* * * * * * *

''Taluka Sikandarpur, granted by the Government—Settlement be made in respect of half with my wife and her issue and in respect of half with my brother, Murtaza Husain. Rs. 500 be allowed every year to my sister, Musammat Bibi Sughra.

''Taluka Khanpur—After me, the *lambar* should stand in the name of my wife and my brother, Murtaza Husain Villages Sharifabad and Alapur, with the villages appurtenant thereto, should remain in the possession and occupation of my wife, and after her, in that of her issue, male or female. They should pay the revenue assessed by the Government, and they should live upon the profits thereof.

''It should be better that whatever Ilaqa remains of that half, the management thereof should remain with Murtaza Husain, and the expenses relating to the door and the payment of parole debts should rest with him,—the rendition of accounts to be made yearly. When the grandson (*nawasa*), Mohammad Rafi-uz-zaman, attains the age of discretion, he may take the management in his own hands. During the lifetime of Murtaza Husain this would be a better (arrangement). The rest lies with the heirs''

Upon his death a dispute arose between the brother and the widow. Each claimed to have his or her name put on the register, and mutation proceedings were begun accordingly.

It should be stated that besides the question of the validity of the bequests there were further disputes as to whether each of the legatees should be entered on the register in respect of his or her share, or whether the brother should be entered in respect of the whole, and also as to the force and effect of a clause in the will purposing to restrain alienation.

When serious litigation seemed imminent the parties were persuaded by a Government officer to submit their disputes to arbitration, and they entered into a submission in the following terms:—

''IN THE COURT OF THE DEPUTY COMMISSIONER, BARA BANKI.

''We are Chaudhri Murtaza Husain, son of Chaudhri Husain Bakhsh, and Musammat Bibi Bechan-un-nisa, Talukdar of Taluka Khanpur, etc, Pargana Haidergarh, District Bara Banki Whereas by mutual consent

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(expressed) in the presence of Mr. William Glynn, Deputy Commissioner of Bara Banki, for removing disputes between me, the declarant, and the Chaudhrain, widow of (my) brother Sarfaraz Ahmad deceased, according to the clauses given in the will of (my) brother and (in respect) of property not given in the said will, (we) have appointed Chaudhri Ghulam Farid, Talukdar (of) Barai, Pargana Rudauli, and Raghunath Singh, Talukdar (of) Pali, referees We agree and duly execute this agreement in accordance with Act XVIII of 1869 (to the effect) that, after perusing the clauses given in the will and (considering) other matters, in whatever way our referees will decide and remove our mutual disputes, we accept now and hereafter. Thereafter we shall not raise any objection to that award or deviate therefrom. Wherefore we reduce these few presents to writing by way of an agreement so that it may serve as an authority and be of use when required.

"Dated 14th February, 1871."

Thereupon there were lengthy proceedings in the arbitration which has been brought before their Lordships' notice. The brother at first contended that the bequests in the will were invalid, but during the course of the arbitration he agreed that the will should be treated as valid, and the arbitrators recorded what may be called a secondary submission in the following terms:—

"After a long discussion the parties have agreed to this that they give up their different causes of action, *viz*, claim for partition according to Mahomedan Law and inheritance based on custom and statutory law, but are agreed that the contents of the will which are disputed by them be construed and explained, that in other respects the will be upheld, but a decision be given with regard to such properties as are not mentioned in the will, for instance, such villages which are separate from talukas Bhilwal and Khanpur, not mentioned in the will, as also in moveable property in possession of Chaudhrain Sahiba; and a specification of debts and *dastgardan* (simple debt) be made to ascertain as to how much should be paid by each party."

The arbitrators thereupon stated certain issues which they would consider, and the parties were heard thereupon, and finally an award was made on the 16th March, 1871. This is a very elaborate and reasoned document, and contains various statements showing the desire of the arbitrators to affirm the provisions of the will, but to make the devolution of the testator's whole property follow as nearly as possible the devolution which would take place on an intestacy under the Mahomedan Law, and generally to do justice between the two parties having regard, among other things, to the fact that the taluk of Bhilwal with Hasanpur came to the deceased in right of his wife—now the widow—from her father.

The arbitrators had also to deal with the fact that there were certain villages not originally part of any of the taluks, but acquired by the deceased out of his savings and as investments, and that neither these nor the personal property of the deceased, which was of considerable value, had been disposed

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of by the will, but were now to be dealt with by the arbitrators as part of the estate of the deceased.

In the result they divided the taluks of Khanpur (with the exception of two villages which they considered belonged really to Bhilwal) and Sikandarpur between the parties, awarded Bhilwal with Hasanpur to the widow, divided the after-acquired villages between them, and divided the personal property in such a manner as to bring the ultimate acquisitions in the combined kinds of property nearly equal as between the two lines.

It would be observed that the only parties to the award were the brother and the widow, and that the daughter and her issue were not parties.

The probable explanation of this is that though the arbitration ultimately took a wider range, the dispute started on the question which of the two should be entered on the register, and that the daughter, as her estate was not a present one, would in no circumstances be put on the register.

It may be also that the parties were impressed with the general Mahomedan Law according to which it is said that no notice is taken of an attempt to limit an estate in land to the grantee for life with remainder over, but that all such gifts are treated as gifts out and out to the first taker; or, finally, it may be that the dispute was considered as one between the two lines, and so the daughter and her issue were deemed for this purpose to be sufficiently represented by the widow.

This absence of the daughter has given rise to a good deal of discussion in the course of the case, but their Lordships think it immaterial for the purpose of either of these appeals, because as regards that which will be first dealt with (that is the claim on behalf of the brother's line) all the opponents can deduce title through the widow, and, therefore, are bound by the award, and entitled to avail themselves of its provisions.

This being so, for the purposes of the first appeal their Lordships have only to determine whether the award was binding or not, and if binding what is its true construction.

At first sight it would appear somewhat remarkable that Murtaza Husain, whose original contention was that the will was invalid, should have, during the proceedings in the arbitration, admitted its validity; but the explanation may be that he would have been exposed to another danger if the will had been invalid, because Zainab-un-nisa's son did actually put forward a claim to be treated as if he were his grandfather's adopt-

ed son, or, in the language of section 22 (4) of the Oudh Estates Act "in all respects as his own son."

After the award had been published the widow desired to make it a rule of Court. The brother opposed this, and gave various reasons why the award should not be considered effective, and he fought the case up to the Privy Council, when it was finally decided against him, and the award was established and made a rule of Court. The case in the Privy Council is reported in *Chowdhry Murtaza Hossein* v. *Mussumat Bibi Bachunnissa.*[2]

Murtaza Husain died in 1880, and was succeeded by his son, Mustafa Husain, and finally by his grandson, Mujtaba, and the Court of Wards on behalf of Mustafa, is the plaintiff in the suit first to be dealt with, and the grandson Mujtaba appellant in that suit to His Majesty.

The widow died in 1895, and was succeeded by her daughter, who died in 1907, leaving a son, not the one who was in being at the time of the original testator's will, but an after-born one, Shafiq-uz-zaman, who, and whose representatives are, respondents in both appeals.

The Court of Wards on behalf of Zainab-un-nisa, the daughter, obtained mutation of names upon her mother's death in her favour. The application was contested by Mustafa Husain, but he failed, and the Court, on behalf of Zainab-un-nisa, remained in possession of the estate till her death, which occurred on the 30th August, 1907.

On her death the Court, on behalf of her son, Shafiq-uz-zaman, obtained mutation of names in his favour without any objection made at the time.

In November, 1908, the Court released the property to Shafiq, who proceeded to dissipate it, borrowing large sums of money on mortgage, and eventually being adjudicated insolvent in 1914.

In 1919 the suit which should be first dealt with (though it is second in order of date as a suit) and the appeal in which has been described as the first appeal was launched, as already stated, by the Court of Wards on behalf of Mustafa Husain, the son of Murtaza Husain, claiming possession of the talukas and shares of taluka which had been awarded to the widow.

The case made was that the dispositions in the will in favour of the children of Zainab-un-nisa were illegal, and incapable of taking effect, and that upon her death the plaintiff became entitled

2. (1876) L.R. 3 I.A. 209.

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under the will and the award and under the general law governing the devolution of the estate.

The case made by the defendants was that upon the true construction of the will the widow had been given the estate in absolute ownership, and that there was no remainder or reversion to accrue to the brother's line, and that even if this were not so provided by the will the parties by their submission to arbitration had left the matter to the arbitrators, who had determined plump and plain, as between the two lines, that so much of the property went to the brother and the rest to the widow, and that however much this might have been complained of by the daughter as a third party or by her issue, it could not be rejected by the brother and those claiming under him, and that on the other side Shafiq and those claiming in his right could deduce their title from the widow and could avail themselves of the position given to her by the award.

And this, in their Lordships' view, is sound.

Then it was said first that this was not the true construction of the award, secondly, that if it was the true construction the award was bad, and thirdly, there was a sort of composite argument that such a construction would make the award so patently wrong that it ought not to be accepted.

The District Judge held that upon the true construction of the award the brother was entirely excluded from any interest in the property awarded to the widow, and that at any rate, as far as he was concerned, it must be taken that the widow got the absolute ownership of the property awarded to her, and this view was confirmed by the Court of the Judicial Commissioner which has now become the Chief Court.

There is an abundance of reasons for holding that this view is correct. First as to the taluk of Bhilwal with Hasanpur, there can be little doubt that the arbitrators intended the widow to have an absolute estate in this, which was property coming through her father. Secondly, the villages not included in the will were divided between the two parties by virtue of the power given to the arbitrators to decide generally upon matters in dispute between the parties, and as they unquestionably gave half of these villages to the brother for an absolute estate, so they must have intended to give away the other half for a corresponding estate. Otherwise the reversion in one half was not provided for. Thirdly, the debts on the whole property were divided half and half, which would be an unreasonable division if on the one side there was an absolute estate and on the other

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one for life only. Fourthly, the widow had a claim for dower which has been wiped out, but in respect of which some compensation would naturally be expected. And, lastly, it must be remembered that the arbitrators had all along before their eyes the idea of complying, when possible, with the Mahomedan Law, and that law, as already stated, would confer an absolute estate upon the first taker.

Their Lordships are of opinion that the view taken by the Courts in India on the construction of the award was correct.

As to the contention that the arbitrators had not the power to decide against the will, and that the award, if construed in the ways suggested, would be against the will, their Lordships see no force in it. The only respect in which the arbitrators could be said to have made an award against the will would be that they had excluded, or apparently excluded, the daughter and her issue. As to them the question is unimportant, because they were not parties to the arbitration and were not bound by the award, which is no concern of theirs.

As between the two parties to the award there was nothing contained in it which could be construed as anything more than a decision upon the various questions which the parties submitted to them. It should be remembered that in the original submission power was given to the arbitrators to consider other matters beside the will, and that when they recite the second submission they state that as regards the properties left by the will they are merely construing and explaining matters which are in dispute concerning the will. As was said by the Judicial Commissioners, the arbitrators must be deemed to have had full authority to put such interpretation on the clauses of the will as they thought proper.

To this it may be added that, as already stated, the brother attacked the award and carried his complaints up to the Privy Council, when the award was finally confirmed, and that it does not appear that he took the objection that the award travelled outside the submission, but if he did take it this objection was overruled.

Their Lordships are therefore of opinion that the case made on behalf of the appellant, the grandson of the brother, by the manager of the Court of Wards fails.

If their Lordships had been of a contrary opinion they would have required to hear the further defences set up by the respondents under the Limitation Act and the Transfer of Property Act. These defences, which were supported by the District

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Judge and by the Court of the Judicial Commissioner, were also attacked by the appellant. Their Lordships, during the course of the argument, formed so clear an opinion upon the principal point in the case that they deemed it unnecessary to hear argument on these questions. But one of them will come into consideration in respect of the second appeal. This first appeal fails.

The second appeal (namely, 113 of 1926) relates to a suit brought by a sister of Shafiq, and the representatives of a deceased sister claiming against him and his transferees shares in the property as having descended from their mother according to the rules of Mahomedan Law.

The case is shaped in this way. Bechan-un-nisa made a will in favour of her daughter, Zainab-un-nisa, and her grandson, Shafiq-uz-zaman. But this will was inoperative under Mahomedan Law because it was made in favour of one of the heirs without the consent of the others.

This proposition may be assumed for the purpose of the present decision.

Then the plaintiffs say that Bechan-un-nisa came into the property not by virtue of succession to her husband Sarfraz Ahmad according to the provisions of the Oudh Estates Act, but by the operation of the award which must be treated as a transfer under section 15 of the Act to a person not qualified by section 13, and that so the property got outside the Act, and its succession would in future be regulated by the rules which would govern the succession to property bought from an outsider.

They deny that there was any family custom as to succession, and say that the succession devolved according to the ordinary law applicable to Mahomedans. And though it is nowhere definitely stated they may perhaps be taken as saying further that if there was or is any family custom of descent this custom ceased whenever the property was taken out of the Oudh Act.

If, then (they say), the statutory entail was destroyed and there either was no family custom or that custom was destroyed, the daughter Zainab would have under Mahomedan Law succeeded to a share in her mother's estate, and the other shares would have gone to two collaterals. But these latter made no claim, and Zainab was put into possession of the whole property through the Court of Wards, and remained in possession and acquired a title by adverse possession to the shares of the collaterals, and so held the whole property, and the succession to

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her estate should devolve according to Mahomedan Law, upon her son and her daughters.

Dealing with the point as to the succession of Bechan-unnisa their Lordships' notice that the Judges in the Court of the Judicial Commissioner agreed with the contention of the appellant that the effect of the will and of the award was to bring into operation section 15 of the Oudh Act, and to take the property out of the limitations or entail prescribed by that Act, because the brother and not the widow was the person who would have conformed to sub-section (1) of section 13 as the only qualified legatee, and a daughter is no heir at all under the Act. This is apparently the inference which should be drawn from recent decisions of the Board such as that in *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh.*[3]

But the taking of an estate out of the statutory entail does not *per se* render inoperative a statement made in the Act that this particular estate descended by custom in a particular manner. Their Lordships have, therefore, supposing the plaintiffs to be right in their first contention, to see if there was a family custom applicable to these properties.

In these cases there are two ways in which a custom may attach. There might be a custom applicable to all descendants from some common ancestor (Iman Baksh is suggested) in respect of all estates, or the custom might be limited to the capital or principal estate, as, for instance, where there is a gaddi. This is well stated in the judgment of the Subordinate Judge.

Now the talukdar Sarfaraz Ahmad is entered in the second list in respect of these very talukas (except Sikandarpur), and it is declared by section 8 that as to these very estates there is a family custom (not created by the Act but recited in the Act) by which these talukas descend to a single heir.

The mass of evidence, therefore, offered on behalf of the plaintiffs to show that there was no family custom need not be discussed. As to these talukas the Act renders such an enquiry idle.

Their Lordships were reminded that the statement in the Act is conclusive only as to the estates mentioned in the Act, as was stated in the case, *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan,*[4] but these estates are all mentioned in the Act.

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3 (1904) L R. 31 I.A. 132· I.L R. 26 All. 393' (P.C.)
4. (1916) L.R. 43 I.A. 269: I.L.R 38 All. 552· 31 M.L.J. 804 (P.C).

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Their Lordships therefore agree with the Courts in India that the custom was proved as to the estates in question other than Sikandarpur.

Then it is said for the plaintiffs that the will and the award made the estates pass otherwise than according to the custom. This breach of the custom, however, in a particular instance, supposing it to have happened, need not destroy it for all time, and if there was a departure made by the exclusion of the brother it was done with his consent, and the cession of the immediate heir in favour of the next heir cannot be deemed to make a breach in the custom. As was well observed by the Judges in the Court of the Judicial Commissioner the incidents of succession applicable to the estate, as laid down by the statute, ceased to be applicable, but the family customs governing the succession to the estate continued to be applicable.

Their Lordships have still to determine the position as to the villages which were not part of the original talukas, but which were acquired by Sarfaraz Ahmad, and half of which were assigned by the award to Bechan, and as to the half of the taluka of Sikandarpur, which was similarly assigned to her.

As to the villages the Courts in India have treated them as incorporated with the talukas, and no complaint is made of this.

As to the half of Sikandarpur it may be treated in the same manner. Or it may be looked at in this way: The sanad, which gave the limitation of primogeniture and brought the talukas into List 5 of the Act, was not deprived of all effect by the voluntary cession of the brother of Sarfaraz Ahmad, and when the half taluka is found in the possession of Zainab at her death (however it got there) it should descend to her only son *secundum formam doni*.

In the opinion of their Lordships the case for the plaintiffs-appellant fails, and it would not be necessary to go further.

There was, however, a further matter which formed a ground of defence for all those defendants who have appeared as respondents before their Lordships; though probably not open to some of the respondents who have not appeared. The point has been discussed at length before their Lordships, and they think it right to express their opinion upon it. It turns upon section 41 of the Transfer of Property Act IV of 1882, which is in the following terms:—

"Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable

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on the ground that the transferor was not authorised to make it provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith "

The Subordinate Judge thought that this section did not afford protection to any of the defendants, but the Judicial Commissioners thought otherwise and in their Lordships' view rightly.

Upon the death of Zainab-un-nisa on the 30th August, 1907, possession was taken of the estates on behalf of Shafiq by the Court of Wards on the 29th November, 1907. In November, 1908, as already stated, the Court of Wards released the estates to Shafiq, and this suit was not instituted till the 2nd June, 1914, some months after Shafiq had completed his spendthrift career by being adjudged insolvent.

It is said that the claimants were women; but both of them had husbands, and one husband was in an official position and understood business. They were not ignorant of the state of the family and of the descent of the property and of such claims as they might have to share in the succession. In fact, one of them had some discussion and negotiation on the subject with Shafiq. The wives, and after the death of one, her representatives were receiving allowances from the Court of Wards, such as are usually made to junior branches when the estate vests in one heir. It is difficult to suppose that they were entirely ignorant of the way in which Shafiq was encumbering the estate. This seems to their Lordships to satisfy the first condition of the section. Shafiq was allowed to be the ostensible owner of the property with the implied consent of the claimants.

As regards the second condition the Bank which took the principal mortgage certainly took reasonable care to ascertain that the "transferor had power to make the transfer."

Then the other respondents who purchased under arrangements made for realising parts of the property in order to discharge part of the encumbrance of the Bank, must equally be held to have taken reasonable care.

Both appeals fail. In the appeal brought on behalf of Mujtaba Husain, their Lordships will humbly advise His Majesty that it should be dismissed with costs, and that the three sets of respondents who appeared separately are entitled to their several costs.

As to the appeal brought by Zarif-un-nisa Bibi and others, their Lordships will humbly advise His Majesty that it should be dismissed with costs.

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Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondent No. 4: *Watkins & Hunter.*

Solicitors for respondents Nos. 5 and 15: *Hardcastle Sanders & Co.*

Solicitors for respondents Nos. 9, 10, 11 and 14: *T. L. Wilson & Co.*

K.J.R. *Appeals dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD ATKIN, LORD SALVESEN AND SIR JOHN WALLIS.

Ramdutt Ramkissen Dass .. *Appellants**

v.

E. D. Sassoon and Company .. *Respondents.*

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Arbitration proceedings—Arbitration Act, 1899—Limitation Act—Applicability of—Arbitrator—Legal defences, including defence of limitation—Duty to give effect to—Prior infructuous arbitration proceedings before arbitrator without jurisdiction—Subsequent proceedings in respect of same claim before arbitrator with jurisdiction—Continuation of former proceedings or fresh proceedings—Time spent in former proceedings—Deduction of in subsequent proceedings—Limitation Act, S 14—Analogy of—Applicability—"Civil Proceedings in a Court"—Meaning of.

The Indian Limitation Act, 1908, applies to arbitration proceedings, and an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation.

Although the Limitation Act does not in terms apply to arbitrations, in mercantile references it is an implied term if the contract that the arbitrator must decide the dispute according to the existing law of contract, and every defence which would have been open in a Court of Law can be equally proponed for the arbitrator's decision unless the parties have agreed to exclude that defence.

Under an arbitration clause contained in a mercantile contract, arbitration proceedings were started in 1915, and they resulted in an award That award was, however, ultimately set aside by the Privy Council on the ground of want of jurisdiction of the arbitrator appointed In 1922, arbitration proceedings were against started in respect of the same subject-matter before an arbitrator duly appointed.

Held, that the subsequent proceedings were not a mere continuation of the former arbitration proceedings.

Arbitrations under the Indian Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits, but by procuring awards and filing them in Court and resisting applications to set them aside. The analogy of S 14 of the Indian Limitation Act requires that an arbitrator should exclude the time spent in prosecuting in good faith the same claim before an arbitrator who was without jurisdiction.

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*P.C. Appeal No. 107 of 1927. 24th January, 1929.

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"Civil Proceedings in a Court" in S. 14 of the Limitation Act must be held to cover Civil Proceedings before arbitrators whom the parties have substituted for the Courts of Law to be the Judges of the disputes between them.

Appeal No. 107 of 1927 from an order of the High Court, Calcutta, dated the 8th November, 1926, which on appeal affirmed an order passed by the said High Court in its original jurisdiction on the 19th April, 1926, and dismissed the appellants' application to have an award set aside and taken off the file.

The material facts for the case are set out in their Lordships' judgment. The previous stage of the case before the Privy Council is reported in *Sassoon & Co.* v. *Ram Dutt Ramkissen Dass.*[1]

On the 3rd March, 1926 the opinion of the Court on the questions propounded by the arbitrators in their award, was delivered by Sanderson, C.J. and Rankin, J., and the same was added to and formed part of the award.

The opinion of the learned Judges was (1) that the defence of limitation could be raised in the matter in question; (2) that in the circumstances of the case the respondents' claim was not in fact barred by limitation.

The reasons given for the opinion may be summarised as follows:

Question 1.—That though the Indian Limitation Act does not in terms apply to arbitration proceedings, it must be presumed that the parties to a submission to arbitration intend, unless they express themselves to the contrary, that their rights in the arbitration shall be the same as if they were being investigated by a Court of Law. That in the submission to arbitration in the present case, no contrary intention was expressed and that therefore the defence as to limitation was open to the appellant.

Question 2.—That the respondents' claim was not a new claim, that in respect thereof they claimed arbitration in July 1915, which was within the time allowed by the law of limitation governing suits, that the first arbitration was infructuous because of want of jurisdiction in Mr. Singleton as sole arbitrator, that the second arbitration before Messrs. Dredge and Henderson was in the nature of a trial *de novo* of the same claim, and that therefore the respondents' claim was not barred by limitation.

On the 30th March, 1926 the appellants filed on the original side of the High Court at Calcutta the petition out of which the present appeal to the Privy Council arose. The petition set out that the learned Chief Justice and Rankin, J., had delivered their opinions on the questions submitted to them and had ordered that such opinions should be added to and form part of the award. The petition submitted that the award was bad and should be set aside in

1. (1922) I.L.R. 50 Cal. 1.

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as much as there was an error patent on the face of the award and the award was otherwise invalid and inoperative.

This petition was dismissed by Buckland, J., on the 19th April, 1926. The learned Judge stated in his order:

"The object of the application is to secure an order that the award made by the arbitrators may be taken off the file The ground, stated shortly, is that the award is bad by reason of an error of law on the face of it. The arbitrators propounded certain questions for the opinion of the Court. The opinion of the Court as to such questions was delivered by the learned Chief Justice and my learned brother Mr. Justice Rankin on the 3rd March, 1926 and they directed that their opinion on the special case should be added to and form part of the award. In so far as such opinion forms a part of the award it is not appealable but it is contended that it amounts to an error in law on the face of the award. Consequently I am invited to hold that such opinion is wrong and that there is an error in law on the face of the award which should result in this award being set aside. Whether I should accept such opinion or whether I should not accept it and hold that the contention of the applicant is correct, the result will be that in either case there will be an appealable order which will enable the matter to be taken by successive stages to the highest tribunal to which the parties have access. Learned counsel has frankly stated that this is the position and in the circumstances he has rightly anticipated that, though the opinion of my learned brothers is open to review before this Court in the circumstances in which the matter is now brought forward, I should not be prepared to do so, and in the circumstances therefore the only course to pursue is to dismiss this application with costs."

From the order of Buckland, J., dated the 19th April, 1926, the appellant appealed to the High Court at Calcutta in its Civil Appellate jurisdiction. The appeal was heard before Rankin, C.J. and Ghose, J., who on the 8th November, 1926, dismissed the appeal. The judgment of their Lordships was delivered by Rankin, C.J. and the material portion of it is as follows:—

"This appeal comes before us quite formally It appears that on the 3rd March, 1926 a Division Bench of this Court presided over by the then Chief Justice decided certain points of law which had been stated for the opinion of the Court by arbitrators under the provisions of the Indian Arbitration Act. . . . Thereupon the opinion of the Court by a process to be found in the Indian Arbitration Act and in our Rules became part of the award, and the effective award was based upon the opinion of the Court as therein expressed. The present appellants had been desirous to take the questions which were then decided to His Majesty in Council for a further opinion, but it was ruled against them that an appeal did not lie to the Privy Council from a mere opinion of this Court on a case stated by arbitrators. Accordingly the present appellants moved the learned Judge of the Court below (Buckland, J.), to set aside the award on the ground that it disclosed errors of law on the face of it, the reasoning being that the judgment of this Court upon which it, (i.e., the award) was based was wrong in law, and it being manifest that the award was based upon that judgment the award itself could be set aside on the merits as disclosing an error of law on the face of it. The learned Judge (Buckland, J.), not unnaturally felt himself bound by the opinion of the Division Bench and was not prepared to interfere on the footing that the Division Bench took an erroneous view The appeal now comes before us as another Division Bench co-ordinate with the one which really tried out these points.

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Mr. S. M. Bose for the appellants very properly states that he does not expect that this Court should revise the opinion of the Division Bench which has already dealt with the matter. It is necessary, however, that he should come to us on his way to the Privy Council, and though that appears to be a perfectly correct course the appeal must be dismissed with costs."

From the said appellate order of the High Court, dated the 8th November, 1926, the present appeal was preferred to His Majesty in Council.

De Gruyther, K.C. and *Wallach* for appellants.

Dunne, K.C. and *Hyam* for respondents.

24th January, 1929. Their Lordships' judgment was delivered by

Lord Salvesen.

LORD SALVESEN.—This is an appeal from an order of the High Court of Judicature at Fort William in Bengal, dated the 8th November, 1926, which on appeal confirmed an order passed by the said High Court in its original jurisdiction on the 19th April, 1926, and dismissed the appellants' application to have an award set aside and taken off the file.

The material facts which are not in dispute have been so fully set forth in the judgment now under review that the barest summary is all that is required to raise the two questions of law on which their Lordships have to decide. Under various contracts between the 16th September, 1913, and the 2nd March, 1914, the appellants sold to the respondents certain quantities of jute. The contracts were all in a form approved by the Calcutta Baled Jute Trade Association and contained an arbitration clause such as is usual in mercantile contracts at the present day. The reference is in the widest form and submits to arbitration "any disputes arising out of or in any way relating to this contract or to its construction or fulfilment between the parties hereto and whether arising before or after the date of expiration of this contract." The clause also imports the rules and by-laws of the Association which provide machinery for carrying out the reference in the event of one of the parties failing to appoint an arbitrator within 48 hours after having been called upon to do so.

As the respective deliveries of jute sold under the contracts were made questions arose as to the quality of the goods supplied by the appellants and the respondents had to submit to large deductions in respect of alleged inferiority of quality. The cause of action arose at different times, but it is not material to consider the exact dates as the respondents showed due diligence in making their claims, for these were formulated in July, 1915, when a

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demand for compensation for breach of contract was made on the appellants, who refused to consider same.

On the 15th July, 1915, the respondents appointed an arbitrator to act on their behalf and called upon the appellants to appoint an arbitrator on their behalf, which after some delay they did in December, 1915. The appellants were, however, obviously not anxious that the arbitration should be proceeded with, and they endeavoured to obtain delay in every way that was open to them. Their arbitrator, Babu Gossain, refused to meet with the respondents' arbitrator, Mr. Allen, and ultimately Mr. Allen retired from the reference on the 7th March, 1916, and Mr. Singleton was appointed as arbitrator on behalf of the respondents in his place. The latter was equally unsuccessful in his efforts to get Babu Gossain to meet him, and after many excuses the latter on the 30th July, 1916, withdrew from the matter. On the 27th July, 1916, the respondents wrote to the appellants a letter, referring to the retirement of Babu Gossain, and adding "we therefore call upon you to appoint an arbitrator to act on your behalf in the place of Babu Gossain within 48 hours, failing which we shall apply to the Baled Jute Association to make an appointment on your behalf in accordance with By-Law 15 of the Association." To this letter the appellants replied on the 31st July as follows:—

"The time limit under the Indian Arbitration Act is over, and we regret that we cannot agree to further extension of time Regarding your suggestion that you will ask the Chairman of the Association to appoint an arbitrator, we beg to point out that the Chairman has no authority to override the provision of the Indian Arbitration Act. Further, we hold that the dispute to settle which this arbitration was agreed upon does not come under the terms of the Allied Baled Jute Association Contract so the Chairman cannot exercise his right under the contract"

To this letter the respondents replied rejecting the contentions of the appellants and calling upon them to appoint an arbitrator to act on their behalf within seven clear days from the date of their letter, in default of which they stated that they would appoint their own arbitrator as sole arbitrator in the reference in accordance with the provisions of the Indian Arbitration Act, section 9 (*b*). As the appellants made no further appointment, the respondents appointed Mr. Singleton to act as sole arbitrator, which he accordingly did, and in the end made an award of Rs. 68,574. His award, which was dated 28th September, 1916, was duly filed and a warrant was issued directing the sheriff to levy the amounts awarded by seizure of the appellants' goods, and this was done.

The appellants thereafter, on the 8th January, 1917, brought a suit for a declaration that Mr. Singleton's awards were void

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and inoperative on the ground that his appointment as sole arbitrator was illegal.

On 7th April, 1920, the Judge of the first instance upheld the award, but on appeal to the High Court at Fort William this judgment was reversed and an appeal taken by the present respondents to the Privy Council was dismissed.

These proceedings occupied a considerable time. It was not until 13th December, 1920, that the decision of the High Court was pronounced and the decision of the Judicial Committee of the Privy Council was only issued on the 20th July, 1922. Taking either of these dates, much more than three years had elapsed from the date when the cause of action had arisen. On the 13th December, 1922, the respondents again demanded from the appellants the amount which they claimed under the 11 contracts, and on the 28th December appointed Mr. W. G. Dredge as arbitrator. The appellants declined to appoint an arbitrator on the grounds that the alleged claims were barred by limitation. On the 16th March the Chairman of the Baled Jute Association nominated Mr. D. S. Henderson to act as arbitrator with Mr. Dredge. The appellants thereupon on the 10th April, 1923, applied to the High Court for an order reviewing the various submissions to arbitration. After sundry procedure a consent order was made on the 15th August, 1923, that the matter in dispute be referred to the arbitration of the two arbitrators appointed to "deal with the matter and to make their award in the said reference and at the same time to state a special case for the opinion of this Court [the High Court] on the legal question of whether the defence of limitation can be raised in these matters and if so whether the claim is barred."

The arbitrators having awarded a sum of Rs. 98,258-11-3 stated a case in accordance with the High Court's order. This was decided on the 3rd March, 1926. The High Court held that the arbitration proceedings had been in fact instituted on the 15th July, 1915, and therefore within the period of three years prescribed by the Limitation Act. It is from this order that the appeal has now been brought.

The first question of law which arises is the important general one, whether the Indian Limitation Act, 1908, applies to arbitration proceedings. The relevant section of that Act is section 3—"Subject to the provisions contained in sections 4 to 25 inclusive, every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

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Their Lordships will consider subsequently what effect, if any, is to be given to sections 4 to 25, but it is admitted that Art. 115 of the first schedule is that which applies to the subject-matter of the present suit. It is expressed as follows:—"For compensation for the breach of any contract expressed or implied not in writing registered and not herein specially provided for," and the period of limitation is three years.

It will be observed that section 3 has in view primarily suits, appeals and applications made in the law courts and makes no reference to arbitration proceedings. Their Lordships were not referred to any case decided in India as to whether this clause can be extended by analogy to arbitration proceedings, but similar language is employed in the English Statute of Limitations, and the question has been considered and decided in one case in England. This is the case of *Astley and Tyldesley Coal and Salt Co.* v. *Tyldesley Coal Co.*[1] In that case it was held by the Divisional Court consisting of Bruce and Ridley, JJ., that:

> "a submission to arbitration does not *per se* exclude the right of either party to raise the defence of the Statute of Limitations, but if it be intended to exclude such a defence an express term to that effect must be imported into the agreement of submission"

In his judgment Bruce, J., said:

> "There is nothing in the submission to take away the right of the Tyldesley Coal Company to raise any defence in relation to their liability to damages It seems to me unreasonable that parties to a submission should be precluded from raising the defence of the Statute of Limitation unless a provision to that effect be drawn up and embodied in the submission"

Previous to that decision there had been general statements in other cases which lay down more clearly the principle upon which the decision must be taken to have proceeded. In *Aubert* v. *Mase,*[2] Chambre, J., said: "There is no doubt that an arbitrator is bound by the rules of law like every other Judge," and in *Jager* v. *Tolme,*[3] the Judge said: "The Council [that was the Council of the London Produce Clearing House] are to give a decision. They are to decide and in the absence of fuller and wider powers expressly given, that means to decide according to the legal rights of parties." The decision in *Tyldesley's* case was cited in a recent case that came before the King's Bench Division, *Board of Trade* v. *Cayser Irvine & Co.*[4] In the course of his judgment, Rowlatt, J., before whom the case first came, said that:

1. (1899) 68 L.J., Q.B., p. 252.
2. (1801) 2 Bos. & P. 371, 375.
3. L.R. (1916) 1 K.B. 939 and 953.
4. L.R. (1927) 1 K.B. 269.

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"the Statute of Limitations (21 Jac. 1 Cap 16) does not in terms apply to arbitrations. It does not affect the debt It only limits the remedy, and therefore it seems to me that in an arbitration it is a question of construction whether the submission requires the arbitrator to follow the analogy of the Statute"

In the Court of Appeal Lord Hanworth, M.R., found it unnecessary to consider this question, which as he observed involved the point whether *Tyldesley's* case was correctly decided. Scrutton L.J., reserved to himself liberty to consider "when the case arises whether it was rightly decided" and Romer, J., also reserved his opinion upon that point. The case was taken to the House of Lords and is reported in *Board of Trade* v. *Cayser Irvine & Co.*[5] Viscount Cave in giving judgment, said:

"My Lords, I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *In re Astley* and *Tyldesley Coal and Salt Company* v. *Tyldesley Coal Company*, that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against that view might seriously prejudice the practice of referring disputes to arbitration; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred"

None of the other Judges who took part in the decision of that case found it necessary to express any definite opinion upon the point, although for the purposes of the decision they were content to assume it. Such being the state of the authorities (the paucity of which may be explained by the fact that where contracts contain an arbitration clause the parties usually contemplate that their dispute will be disposed of), their Lordships are of opinion that the law was correctly laid down in *Tyldesley's* case. Although the Limitation Act does not in terms apply to arbitrations, they think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of Law can be equally proponed for the arbitrator's decision unless the parties have agreed (which is not suggested here) to exclude that defence. Were it otherwise a claim for breach of a contract containing a reference clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law Courts.

Their Lordships are accordingly of opinion that the first question of law must be answered in the affirmative.

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5. L.R. (1927) A.C. 610.

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The next question which arises is whether limitation applies in the present case so as to bar the claim of the respondents under the award which they have obtained. The Judges of the High Court held that the arbitration proceedings which resulted in the award now under consideration were in effect a mere continuation of the former proceedings which had been instituted on the 15th July, 1915, but which proved abortive through want of jurisdiction of the arbitrator appointed. Their Lordships are unable to agree in this view. They think that these proceedings came to an end with the decision of the single arbitrator whose award was ultimately set aside and that the proceedings instituted at a later date after the decision in the Privy Council had been announced cannot be regarded as a mere continuation of the first proceedings. It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical. The hardships that might arise in such a case have, however, been expressly provided for by the sections to which reference will now be made.

The Indian Limitation Act, unlike the corresponding English Act, contains an elaborate code of provisions which deal, *inter alia,* with the mode of computing the period of limitation prescribed for any suit, etc., and also with the exclusion from the period of limitation of time which has been occupied in legal proceedings. The clause specially founded on S. 14 (1), is as follows:—

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it

There is a similar provision as to "applications" and appended to the section there is this explanation:—

"For the purposes of this section, a plaintiff or an appellant resisting an appeal shall be deemed to be prosecuting a proceeding."

It may be assumed that it had been ascertained before these provisions were formulated that there was a serious risk of injustice arising if the period of limitation, which is in many cases shorter than in England, should be too strictly applied. In Indian litigation it is consistent with the experience of their Lordships that the time necessary for the decision in a suit may

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be of much longer duration than one is accustomed to in the Courts of Great Britain. Hence the necessity for some provision to protect a *bona fide* plaintiff from the consequences of some mistake which had been made by his advisers in prosecuting his claim.

Holding, as they did, that the proceedings before the second arbitrators were merely a continuance of the first arbitration, it became unnecessary for the learned Judges of the High Court to deal with the question. It had, however, been dealt with by Greaves, J., in the application which the appellants made to revoke the submission to the arbitrators and to restrain the present respondents from taking arbitration proceedings thereunder. He said:

"It remains for me to decide whether in computing the period of limitation the time occupied in prosecuting the proceedings above referred to is to be excluded. It is urged that having regard to the wording of section 14 of the Limitation Act this section cannot apply. This argument however does not seem to me to be well founded. If limitation, as I think it does, applies in arbitration proceedings, the law of limitation applicable is that laid down in the Limitation Act, 1908, which is expressed to apply to suits, appeals and certain applications to Courts. If, therefore, this Act is to be applied to arbitration proceedings notwithstanding the words above referred to, I see no reason why section 14 of the Act should not apply. If it is said that the wording of the section is not apposite to arbitration proceedings it could equally be said that the wording of the Act itself is not apposite. In my view, therefore, . . . in computing the period of limitation the time occupied in the proceedings which ended in the decision of the Judicial Committee is to be excluded."

Their Lordships are in agreement with the reasoning of the learned Judge. Arbitrations under the Indian Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits, but by procuring awards and filing them in Court and resisting applications to set them aside. In their Lordships' opinion the analogy of the Indian Limitation Act requires that an arbitrator should exclude the time spent in prosecuting in good faith the same claim before an arbitrator who was without jurisdiction. The Limitation Act has no application in terms to arbitration proceedings and as Greaves, J., has pointed out, if the words "suit instituted, appeal preferred, and application made" in section 3 are to be applied to arbitration proceedings it seems to follow that the same interpretation must be put upon them in section 14, and that civil proceedings in a Court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the Judges of the dispute between them. There is no question here that the respondents were prosecuting with due diligence their claim against the appellants and that the

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second arbitration was founded on the same cause of action and was prosecuted in good faith before the previous arbitrator who from defect of jurisdiction was found not competent to exercise jurisdiction in the matter. If the period in question during which the respondents' claim was held up because of the proceedings instituted for the purpose of setting aside the first award and in obtaining final judgment on that question is excluded from the period of limitation, there can be no doubt that the respondents here were within the period prescribed. The result is that the anomaly is avoided of there being a different period of limitation in certain cases where a dispute has been referred to arbitration from that which is applied to disputes dealt with in the ordinary Courts.

For these reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs to the respondents.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondents: *Sanderson Lee & Co.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Meenakshisundaram Pillai .. *Appellant** (*Respt.-Deft.*)

v.

Chokkalinga Pathan and another .. *Respondents* (*Plff.-Respt.*).

Meenakshisundaram Pillai v Chokkalinga Pathan.

Civil Procedure Code (V of 1908), S 47 and O. 21, R. 66—Executing Court—Order directing the properties to be sold in lots and fixing the market value of them and the upset price—Judicial or administrative order—Appeal—Decision as to the order in which the properties are to be sold—Whether appealable

An order of the Executing Court directing that certain properties of the judgment-debtor be sold in certain lots and fixing the market value of such lots at certain figures and also the upset price for each lot does not fall under section 47 of the Civil Procedure Code and is, consequently, not

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*C.M.A. No. 347 of 1928. 16th January, 1929

Reporter's Note—The statement at page 3 of the printed judgment that "It is from this order that the appeal has now been brought," is apparently a slip The order there referred to is the opinion, dated the 3rd March, 1926, delivered on the "special case," and, as pointed out by Rankin, C.J., in the order, dated the 8th November, 1926, an appeal does not lie to the Privy Council from a mere opinion of the Court The appeal to their Lordships was (as stated in the opening paragraph of their judgment) *technically* from the appellate order, dated the 8th Nov. 1926, though no doubt in substance it challenged the correctness of the opinion on the special case—*K.J.R.*

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appealable, although a decision as to the order in which the properties are to be put up for sale will be appealable if it affects the rights of co-defendants *inter se*.

Case-law discussed.

Per Wallace, J.—Where an order of the Executing Court does not affect rights, liabilities or equities, of the parties to the decree, it is not a judicial order and no appeal lies.

Appeal against the Order of the Court of the Subordinate Judge of Kumbakonam, dated 20th July, 1927 and passed in E.P. No. 197 of 1927 in O.S. No. 19 of 1924.

K. S. Jayarama Aiyar for appellant.

K. Bhashyam Aiyangar and *T. S. Subramania Aiyar* for respondent.

The Court delivered the following

JUDGMENTS. *Wallace, J.*—This Civil Miscellaneous Appeal is against the order of the Lower Court in a matter in execution. That Court has directed that in a sale proclamation certain properties be sold in certain lots and has fixed the market value of such lots at certain figures and also the upset prices for each lot. The appellant objects that the lots are too large and the figures of market value too small and appeals on these grounds.

Wallace, J.

The preliminary objection is taken by the respondent that no appeal lies. The order of the Lower Court is admittedly passed under Order 21, Rule 66 (2) (*e*), Civil Procedure Code, which directs the Court to set out in the sale proclamation as fairly and accurately as possible such information as it considers material for the purchasers to know. Orders under Rule 66 are not appealable as such, and an appeal will lie only if the order can be brought within section 47, Civil Procedure Code, as an order deciding a question between the parties to the suit "relating to the execution of the decree." This language is in its terms very wide and might be easily construed to cover every kind of order passed in execution proceedings; but clearly that was not the intention of the legislature. If that were the test, any order passed under Order 21 would be appealable and it would be unnecessary and misleading to state under Order 43 that appeals will lie from Orders under Rules 34, 72 and 92, of that order. In order to find out the test which Courts have in practice applied in deciding whether an appeal lies from an order under Rule 66 by force of section 47 it is necessary to consider some of the reported rulings available.

The leading case for this Court is the Full Bench case in *Sivagami Achi* v. *Subramania Aiyar*.[1] Under the old S. 287,

1. (1903) I.L.R. 27 M. 259: 14 M.L.J. 57 (F.B.).

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corresponding to Order 21, Rule 66, it was laid down that none of the proceedings of a Court under section 287 is an order within the meaning of section 244, now section 47, and appealable. In that very case one of the grounds of appeal was that the market value had been wrongly stated in the sale proclamation and another was an objection to the lots in which the Court had ordered the property to be sold. The Full Bench held that such proceedings are of an administrative character and not judicial. It is pointed out that the application of that decision to similar proceedings under the new Code of 1908 has been doubted by a Bench of this Court in *Kaveribai Ammal* v. *Metha & Sons*,[2] the question there being the appealability of an order by a learned Judge on the Original Side of the High Court refusing to alter the upset price in the sale proclamation. The actual decision however proceeded on a different footing, namely, that the order was not a judgment within section 15 of the Letters Patent. It will be true therefore to say that the remarks therein as to the correctness of *Sivagami Achi* v. *Subramania Aiyar*[1] are themselves *obiter*. In a later very similar case reported in *Tawker & Sons* v. *Harsook Doss Chonghull*,[3] the learned Chief Justice himself, who was a party to the *Kaveribai Ammal* v. *Metha & Sons*[2] case, held that he was bound by the decision in *Sivagami Achi* v. *Subramania Aiyar*.[1] The question whether the slightly altered wording of Rule 66 compared with the old section 287 really affects the application of the Full Bench decision was considered by a Bench of this Court in *Lanka Rama Naidu* v. *Lanka Ramakrishna Naidu*,[4] and answered in the negative. No doubt it has been held that a decision as to the order in which property is to be put up for sale, may be appealable if it affects the rights of co-defendants *inter se*, for example, in a case of execution of a decree on a mortgage where the interests of the owners of the items of mortgaged property will be seriously affected by the order in which the properties are sold. This was the position in *Vedaviasa Aiyar* v. *The Madura Hindu Labha Nidhi, Ltd.*,[5] where it was held that such an order is not purely administrative but one affecting substantial rights, and therefore that the Full Bench ruling will not apply. The ruling in *Narasimha Rao* v. *Subbarayudu*[6] to which one of us was a party is on a similar

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1. (1903) I.L.R. 27 M. 259. 14 M.L.J. 57 (F.B.)
2. (1923) 46 M.L.J. 71.
3. (1923) 45 M.L.J 611.
4. (1923) 46 M.L.J. 192
5. (1923) 45 M.L.J. 478.
6. (1926) 51 M.L J. 135.

position, and to the same effect. In *Thiruvengadasami Aiyangar v. Govindasami Odayar,*[7] it was held that an executing Court is under no obligation to determine market values for the purpose of a sale proclamation, but that if it does its decision is a judicial act. The decision on the latter point was not necessary for the purpose of the case since the complaint before the Court was not that the Lower Court had wrongly determined the market value but that it had not determined it at all. Perhaps in consequence the attention of the Bench was not drawn to the other rulings of this Court quoted above, except to *Narasimha Rao v. Subbarayudu.*[6] In *Rukmani Ammal v. Palaniappa Chettiar*[8] another Bench has again laid down that orders under Rule 66 are administrative and not judicial.

Meenakshisundaram Pillai v. Chokkalinga Pathan.

Wallace, J.

It appears to me advisable that in these matters the principle of *stare decisis* should operate. I may point out however that the view of the Full Bench has been adopted in Bombay—see *Krishna Rao v. Krishna Rao.*[9] In Calcutta—see *Deoki Nandan Singh v. Bansi Singh*[10] and *Panch Duar Thakur v. Mani Ram.*[11] In Patna—see *Deokinandan Singh v. Rajah Dhakeswar Prasad Narain Singh,*[12] *Saurendra Nath Mitra v. Mritunjay Banarji*[13] and *Mohit Narain Jha v. Thankan Jha,*[14] Allahabad—see *Ayudhia Prasad v. Gopi Nath*[15] and that no ruling of any Court directly to the contrary has been cited. I can see no good reason for not accepting the principle which has up till now generally been followed in this Court, namely, that where the order does not affect rights, liabilities or equities, of the parties to the decree it is not a judicial order and no appeal lies. I cannot see how the rights or liabilities or equities *inter se* of the parties to the decree are in question in the present order while it is always open after the Court sale to a party who considers himself aggrieved by the result to show that the market prices set out in the sale proclamation were so grossly inadequate as to amount to an irregularity sufficient to justify the Court in setting aside the sale. I would therefore hold that no appeal lies and I dismiss the Civil Miscellaneous Appeal with costs.

Madhavan Nair, J.—I agree with the order proposed by my learned brother. As I was a party to the decision in *Narasimha Rao v. Subbarayudu,*[6] I would just add a few words.

Madhavan Nair, J.

6 (1926) 51 M.L.J. 135. 7 (1927) I L.R. 51 M. 655: 55 M.L.J. 363.
8 1928 M.W.N. 569 9. (1928) I L.R. 52 Bom. 444.
10. (1911) 16 C.W.N. 124. 11 (1912) 16 C.W.N. 970.
12 (1916) 2 P.L.J. 13 13 (1920) 5 P.L.J. 270.
14. (1925) 4 Pat 731. 15. (1917) I.L.R. 39 All. 415.

Meenakshi-sundaram Pillai v. Chokkalinga Pathan. Madhavan Nair, J.

The appealability of the Lower Court's order in that case was beyond question and this is not now disputed before us; for, by that order the Subordinate Judge directed the sale of the mortgage property in a certain order; in other words, a question at issue between the parties relating to the sale of their respective properties and which may have a very important consequence to them was conclusively determined by it The same cannot be said about the order that is now under appeal. Accepting the argument that it is a judicial order it does not necessarily follow that it is appealable under section 47, Civil Procedure Code. As the order in question does not determine any question relating to the rights and liabilities of the parties *inter se*, I hold that it is not appealable.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE PANDALAI.

Panchanatham Pillai .. *Prisoner.**

Panchanatham Pillai, *In re.*

Indian Evidence Act (I of 1882), S 26—Magistrate—Juge d' Instruction in French territory—Statement by accused in police custody—Admissibility.

A Juge d' Instruction in a French territory in India, who is a sort of committing Magistrate with power to commit or discharge a prisoner but not to convict, is a "Magistrate" within the meaning of section 26 of the Indian Evidence Act and a statement made by an accused in police custody to such a person is admissible in evidence.

Queen-Empress v. *Nagla Kala,* (1896) I.L.R. 22 Bom. 235, referred to.

Trial referred by the Court of Session of the East Tanjore Division, at Negapatam for confirmation of the sentence of death passed upon the said prisoner in Case No. 19 of the Calendar for 1928.

Appeal by the prisoner against the said sentence.

N. Somasundaram for *V. L. Ethiraj* for appellant.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted of the murder of his daughter, with whom he is alleged to have been on bad terms. They were living together in the French portion of a village which is partly in French and partly in British territory. The appellant, it is said, went away with his daughter on 15th or 16th July, 1926, and returned the next

*Referred Trial No. 124 of 1928. 16th January, 1929.

day alone. On 18th P.W. 1 complained to the French police that the appellant had murdered his daughter and at about the same time the appellant reported her disappearance. The appellant was arrested and at once made a confession to a police officer, who has since been dismissed for torturing prisoners in order to extract confessions from them. After this the appellant was placed before the Juge d' Instruction, to whom he made a statement (Ex. J-1) that his daughter was tired of life and that he assisted her to commit suicide. Though it was by then obvious that the murder . . . . . if it was a murder . . . . . was committed in British territories, a French Sub-Inspector, accompanied by a British Constable took the appellant to the river where his daughter had been drowned. The body was not found at the place indicated by the appellant. On the next day it was found a considerable distance away on information furnished by a shepherd boy. That death was not due to natural causes is clear. For the hands had been tied together and the cloth weighted with bricks. At the same time, there was nothing to show that the woman had been stunned or that there had been a struggle between her and her father before her hands were tied and her cloth was filled with bricks. The Juge d' Instruction, who is a sort of committing Magistrate, with power to commit or discharge a prisoner, but not to convict, continued his enquiries till January, 1927, when he sent the appellant up to the *Chambre des Mises en accusation* at Pondicherry. The Court in April held that it had no jurisdiction as the crime had been committed in British territory and the appellant was a British subject. What happened after that is not clear, but it was not till October, 1928, that the appellant was tried by the Sessions Judge of East Tanjore.

A great part of the exhibits consists of the record of the French investigation, of statements made by witnesses and of admissions extracted from the appellant, Mr. Ganapathi concedes that most of it is inadmissible in evidence. He, however, excepts E. J-1, the statement made by the appellant to the Juge d'. Instruction, which appears to us to be admissible under section 26 of the Evidence Act. The appellant was, no doubt, in police custody at the time, but he was in the immediate presence of a judicial officer and if that officer is a Magistrate within the meaning of section 26, the statement is admissible provided, of course, that there is no other legal objection to its validity. We are clear that the Juge d' Instruction is a Magistrate within the meaning of the section. The definition of Magistrate in the General

Pancha-natham Pillai, *In re.*

Clauses Act is not confined to Magistrates exercising jurisdiction under the Criminal Procedure Code; it merely includes them. As pointed out in *Queen-Empress* v. *Nagla Kala*[1] it can scarcely have been the intention of the Legislature to exclude from the consideration of our Court's confessions made by prisoners in police custody to Magistrates in England or in a foreign country. We therefore hold that Ex. J-1 is admissible in evidence.

N.S. *Conviction set aside*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE THIRUVENKATACHARIAR.

Narasimha Rama Aiyar .. *Petitioner** (*Plff.*)

v.

Ibrahim and others .. *Respondents* (*Defts.* 2 *to* 4).

Narasimha Rama Aiyar v. Ibrahim.

Limitation Act (IX of 1908), Ss 19, 20 and 21 (2)—Co-heirs—Payment of interest on debt by one of them—If saves limitation against the others—Distinction in cases of acknowledgment—S. 21 (2)—If applicable to co-heirs.

Where interest on a debt is paid by one of several co-heirs who are liable to pay the debt, such payment is effectual to save limitation as against all the co-heirs. *Velayudam Pillai* v. *Vaithialingam Pillai,* (1912) 24 M.L.J. 66 followed.

Cases of acknowledgment, however, stand on a different footing and an acknowledgment, unless made by the person against whom the right is claimed, does not save limitation against him.

Venkatakrishniah v. *Subbarayudu,* (1916) I.L.R 40 Mad 698 referred to.

Sub-section (2) of section 21 of the Limitation Act should not be extended by analogy to co-heirs

Arjun Ram Pal v. *Rohini Banu,* (1912) 14 I.C. 128 disapproved.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Small Causes at Kumbakonam in S.C.S. No. 4404 of 1926.

C. A. Seshagiri Sastri for petitioner.

K. S. Desikan for respondents.

The Court delivered the following

JUDGMENT.—The question which arises for determination in this petition is whether the suit is barred by limitation against the respondents. The suit is brought on a promissory note executed by one Chinna Babu Rowther on 29th October, 1920, in favour of the appellant (plaintiff). Chinna Babu Rowther died and his estate devolved on his widow, two minor sons and a minor daughter as his heirs. On the 22nd October, 1923, the widow Muhammad Beevi Ammal (1st defendant) purporting to act on behalf of herself and her minor children made a payment of Rs. 5 towards interest due on the promissory note.

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*C.R.P. No. 1679 of 1927. 21st December, 1928.

1. (1896) I.L.R. 22 Bom. 235.

Narasimha Rama Aiyar v. Ibrahim.

Plaintiff sues all the co-heirs, *viz.*, the widow, sons and daughter of Chinna Babu Rowther for the balance due to him on the pro-note.

The respondents who were impleaded as defendants 2 to 4 pleaded that the alleged payment of interest is not true and that even if true, the payment by their mother, the 1st defendant would not save the suit from the bar of limitation as against them. The trial Judge finds that the payment for interest is true but he holds that as the payer, namely, the mother of the other defendants was not their lawful guardian under the Mahomedan Law the payment made by her will not save limitation as against them. He therefore gave a decree for plaintiff only as against the 1st defendant (mother) and dismissed the suit against other defendants. The plaintiff has preferred this petition and the question which arises is whether the payment by the mother saves the suit from the bar of limitation as against her co-heirs also. Apart from the question of limitation there can be no doubt that all the defendants who as co-heirs inherited the property of Chinna Babu Rowther are liable for the debt though such a liability can be enforced as against them only to the extent of the assets of the deceased in their hands.

The petitioner's learned Advocate does not question the correctness of the view taken by the trial Judge that the mother (the 1st defendant) in making the payment cannot be regarded as having made the payment as their guardian or agent but his contention is that under section 20 of the Limitation Act when interest on a debt is paid by any one of the persons who are liable to pay the debt such payment is effectual to save limitation as against all persons liable to pay the debt. The material portion of section 20 on which reliance is placed is as follows:

"Where interest on a debt is before the expiration of the prescribed period paid as such by the person liable to pay the debt a fresh period of limitation shall be computed from the time when the payment was made."

It is argued that the language of section 20 differs materially from that of section 19 which relates to acknowledgments. In the latter section the material words are:

"Where an acknowledgment of liability in respect of such property or right has been made in writing signed by the person against whom such property or right is claimed or by some person through whom he derives title or liability."

It seems to me that apart from the authorities which were referred to on both sides the material difference between the words of sections 19 and 20 strongly supports the petitioner's

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contention. In the case of acknowledgment it must have been made by the person against whom the right is claimed, but in case of a payment for interest or principal all that is required is that it should have been made by a person liable to pay the debt. Section 21 of the Limitation Act has also a bearing on the question. Sub-section (2) of that section says:

"That nothing in sections 19 and 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment, signed by or of a payment made by, or by the agent of any other or others of them"

It will be seen that co-heirs who become liable as such for the debt of a deceased do not come within the words of the section and it is only by analogy if the same is permissible that the section can be extended to the case of co-heirs. In my opinion the extension of the sub-section by analogy to co-heirs is not warranted and I am therefore unable to agree with the decision in *Arjun Ram Pal* v. *Rohima Banu*[1] in which such a view was taken by a single Judge of the Calcutta High Court. I am therefore of opinion that upon the construction of sections 19, 20 and 21 alone, payment for interest made by the mother who was a person liable to pay the debt will save limitation as against her co-heirs also. It does not matter that they took the property as tenants in common and that their interests are several. The payment made by one of the co-heirs is so far as the creditor is concerned payment made on behalf of the estate and it enures to the benefit of all the co-heirs. The question is also amply covered by authority.

The case in *Velayudam Pillai* v. *Vaithialingam Pillai*[2] is directly in point and fully supports the petitioner's contention. In *Venkatakrishniah* v. *Subbarayudu*,[3] Napier, J., points out the distinction between sections 19 and 20. He says that section 19 only operates against the person making the acknowledgment while section 20 makes the payment good in favour of any suit on that liability. In the same case Srinivasa Aiyangar, J., also observes:

"Acknowledgments under section 19 have an operation which is different from the operation of part payments under section 20. The distinction between the effects of acknowledgments and part payments has often been pointed out in England and the same distinction appears to have been made in the enactment of Ss 19 and 20 of the Limitation Act"

The leading English case on the point is *Roddam* v. *Morley*[4] in which it was held by the Lord Chancellor, supported by the opinion of the other Judges, that payment by a devisee for life

1. (1912) 14 I.C. 128
2. (1912) 24 M.L J. 66
3. (1916) I.L.R 40 Mad. 698
4. (1857) 1 De G & J. 3: 44 E.R. 622.

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of interest on a speciality of his testators in which the heirs were bound was held to be acknowledgment made by the party liable by virtue of such speciality within the meaning of the fifth section of 3 and 4 William IV c. 42 and as such sufficient to keep the right of action alive in its integrity against all parties interested in the remainder.

The Allahabad High Court also has taken the same view in *Ibrahim* v. *Jagdish Prasad*.[5] That was also a case in which the co-heirs of a Mahomedan was sued in respect of a debt contracted by him and it was held following *Velayudam Pillai* v. *Vaithilingam Pillai*[2] among other cases that the payment made by one of the co-heirs is sufficient to keep the debt alive against all the co-heirs *Achola Sundari Debi* v. *Doman Sundari Debi*[6] is also to the same effect. *Chanan Shah* v. *Firm of Wadhuram-Jivan-Mal*[7] which is relied on for the respondent is a case in which the mother of a Mahomedan minor made an acknowledgment of debt and it was held that as she was not his lawful guardian she had no authority to make the acknowledgment on his behalf. That case has no bearing on the present in question.

The principle on which payment towards a debt is differentiated from mere acknowledgment is that such payment enures to the benefit of all who are liable to pay which cannot be said of a mere acknowledgment made by one of the persons liable to pay.

The decree of the Lower Court in so far as it dismisses the suit against defendants 2 to 4 must be set aside and a decree passed in favour of the plaintiff against all the defendants for the amount claimed with costs here and in the Court below realisable out of the estate of the deceased Chinna Babu Rowther.

N.S. *Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE WALLACE.

Attili Venkanna .. *Appellant** (1st *Deft.*)

v.

Parasuram Byas trading under the name of Parasuram Doulatram, and others .. *Respondents* (*Plffs.*).

Attili Venkanna v. Parasuram Byas.

Indian Stamp Act (II of 1899), S. 36—Suit on hundi—Production of hundi—Endorsement on hundi by the clerk and affixing of the Judge's

*A.A.O. No. 241 of 1927. 1st February, 1929.

2. (1912) 24 M.L.J. 66

5. (1926) 99 I.C. 424

6. (1925) 90 I.C. 774.

7. (1916) 42 I.C. 17.

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initials by rubber-stamp—Subsequent rejection of hundi by Court on the ground of not being properly stamped—Validity—Admission in evidence—Mere endorsement, if amounts to—Civil Procedure Code, O. 13, R. 4.

In a suit on a hundi, a clerk of the Court stamped the usual endorsement as to the production and admission in evidence of the hundi and the District Munsif's initials were affixed to this endorsement by a rubber-stamp. Subsequently, the District Munsif, on a consideration of the document, *held*, that it was not duly stamped and therefore inadmissible in evidence and rejected it.

Held, that as the District Munsif did not apply his mind to a consideration of the admissibility of the hundi at the time when the endorsement was made by the clerk and his initials were affixed by the rubber-stamp, the hundi could not be deemed to have been admitted in evidence at that time within the meaning of section 36 of the Indian Stamp Act and consequently, it was open to the District Munsif to reject the hundi subsequently on the ground that it was not duly stamped

Held also, that a mere endorsement, under O. 13, R. 4 of the Civil Procedure Code, on a document does not necessarily imply that the Court has considered the question of the admissibility of the document.

Quaere: Whether the provisions of O 13, R. 4 of the Civil Procedure Code can be said to have been complied with in a case where the initials of the Judge is affixed to the endorsement by a rubber-stamp.

Appeal against the order of the Court of the Subordinate Judge of Rajahmundry, dated 11th January, 1927 in Appeal Suit No. 98 of 1926 (A.S. No. 296 of 1925, District Court, Godavari), preferred against the decree of the Court of the Principal District Munsif of Rajahmundry in O.S. No. 550 of 1924.

Ch. Raghava Rao for appellant.

P. Somasundaram for respondents.

The judgment of the Court was delivered by

Phillips, J.

Phillips, J.—In this case the plaintiff (1st respondent) sued on a hundi which was proved by the 1st defendant. Subsequently a clerk of the Court stamped the usual endorsement as to the production and admission in evidence of the document and the District Munsif's initials were affixed to this endorsement by a rubber-stamp. Whether that was done by his own hand or by some one else does not appear. The District Munsif on a consideration of the document held that it was not duly stamped and therefore inadmissible in evidence and rejected it. The Subordinate Judge relying on *Sungappa* v. *Govindappa*,[1] held that when the District Munsif had admitted the document and made the endorsement required by O. 13, R. 4, of the Civil Procedure Code, it was not open to him to subsequently reject it and remanded the suit for disposal. The 1st defendant now appeals against this order.

1. (1902) 12 M.L.J. 351.

Under Order 13, Rule 3, "the Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection." *Prima facie* therefore it would appear that the District Munsif was justified in rejecting this document but it is contended for the respondents that when the endorsement mentioned in Order 13, Rule 4, has been made upon a document—an endorsement which purports to admit the document in evidence —it is not open to the Court to subsequently reject it. This argument would seem to involve that the mere mechanical act of endorsement is sufficient to constitute admission in evidence and that a judicial consideration of its admissibility cannot be had after such endorsement has been made, and this in effect amounts to a contention that the admission of a document in evidence may be done by a purely mechanical act.

In the first place, it is very doubtful whether in the present case the provisions of Order 13, Rule 4, have been complied with, for the endorsement under that rule must be signed or initialled by the Judge. Under section 2 (20), Civil Procedure Code "signed" includes "stamped," but there is no provision that initials may also be stamped. In the present case the Judge's initials were placed on the document by means of a rubber-stamp and certainly the placing of such a stamp by a third person could not amount to initialling by the Judge, and it is not at all clear as to whether the stamp was affixed by the Judge himself or by a third person. I however think it is unnecessary to enquire as to who affixed the rubber-stamp because it appears to me that the authorities are clear that a document is not deemed to have been admitted in evidence until the Judge has applied his mind to a consideration of its admissibility. The mere endorsement under Order 13, Rule 4, does not necessarily imply such consideration and in the present case it is clear from the District Munsif's judgment that he had not considered the admissibility until after the endorsement had been made. This view has been held in *Chunilal* v. *Mulabai*[2] and also by the Punjab Chief Court in *Sundar Das* v. *People's Bank of India*[3] and The Nagpur Chief Commissioner's Court in *Sitharam* v. *Thakur Das*.[4] The case in *Sungappa* v. *Govindappa*[1] is no authority to the contrary for there it was held that although the Judge might have intended to reject the document yet in fact he had not rejected it but admitted it in evidence. The case *Dasi Chamar* v. *Ram Autar*

1. (1902) 12 M.L.J. 351.
2. (1910) 12 Bom. L.R. 466.
3. (1912) 16 I.C. 834.
4. (1918) 50 I.C. 781.

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Singh[5] would perhaps appear to support the respondent's case for it is stated that the documents were admitted in evidence and exhibited and subsequently when it was pointed out that they were not sufficiently stamped the District Munsif removed them from the record of the evidence; but the facts, as is so often the case in these unauthorised reports, do not appear in the report and what exactly had been done by the District Munsif to admit these documents in evidence is not stated. As section 36 of the Stamp Act prohibits the rejection of a document once it has been admitted in evidence even in a subsequent stage of the same suit it is clear that under that section objection could not be taken when there had been such admission. What has to be determined in each case is whether there has been an "admission" or not. This case of the Patna High Court *Dasi Chamar* v. *Ram Autar Singh*[5] does not discuss this point, but it appears to have been assumed that the documents had been properly admitted in evidence. That I hold is not the case here and therefore the District Munsif was justified in rejecting the document.

The appeal must therefore be allowed and the Dsitrict Munsif's decree restored with costs both here and in the Lower Appellate Court.

Wallace, J.

Wallace, J.—I agree and have nothing to add.

N.S. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN, LORD SALVESEN AND SIR LANCELOT SANDERSON.

Ram Charan Ramanuj Das Mohant .. *Appellant**

v.

Gobinda Ramanuj Das Mohant and others .. *Respondents.*

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Ram Charan Ramanuj Das Mohant v. Gobinda Ramanuj Das Mohant.

*Hindu Law—Religious Endowment—*Mutt *with minor* asthals*—*Mohuntship *of, held by usage by one man—Division of, between* chelas*—Wills of* Mohunt *for time being effecting—What amounts to—Validity—Disputes between* chelas *regarding office—Compromise settling—Binding nature of, on parties and privies—Claim inconsistent with—Maintainability by either party of—Suit putting forward claim brought formally in name of idols—Effect—Will—Revocation—Defendant, relative revocation—Doctrine of—Applicability—Later will containing no revoking clause and effecting nothing—Effect—Agreement in nature of compromise or otherwise—Binding nature of—Consideration—Necessity*

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*P.C. Appeal No 134 of 1927. 17th December, 1928.

5. (1923) 71 I.C. 475.

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The *Mohunt* of a *Mutt* with a number of minor *asthals*, the *Mohuntship* of all of which had by usage been held by one man, executed a will in 1908 appointing the 1st respondent chief *Chela* and malik and *Gaddinishin Mohunt* like himself. In 1918, he executed two new wills on the same day. By the first he named the 1st respondent as his successor in regard to one of the minor *asthals*, and bequeathed to him the income thereof, and some lands appurtenant to another minor *asthal*. The second will recited the effect of the first, and bequeathed to *R* all the rest of the property of which the executant was possessed, and appointed him *Gaddinishin Mohunt* Both the wills provided that, in the event of the death of either appointee without appointing a successor, the other *Mohunt* should succeed.

Shortly after the death of the executant disputes arose between *R* and the 1st respondent. They were, however, settled by an arrangement embodied in two *ekrarnamas* whereby the provisions of the two wills were recognised and each of the parties entered into possession of their respective offices, as conferred by the two wills *R* died soon after, having appointed the appellant his successor. Thereupon the 1st respondent instituted a suit disputing the title of the appellant and making a claim to be the sole *Mohunt*. In form the the suit was not brought by the 1st respondent but by the two idols acting through him as their alleged *shebait*.

Held, that the wills of 1918 were separate documents, and that in one of them there was an effectual appointment of the appellant's predecessor (*R*) as *Gaddinishin Mohunt* with some reservations added which might or might not be valid but the existence of which and their appearance as a positive bequest in the other will did not detract from the definite appointment so effectually made.

Held further, that, as far as the two parties to the *ekrarnamas* were concerned, each obtained for himself the benefit of an unquestioned title, and prevented himself from questioning the other's title to his respective office, and that the appellant as privy in estate with *R* was equally entitled to take advantage of the agreement.

Quaere: Whether the 1st respondent could by claiming to use the name of the idols as plaintiffs preclude the operation of the *ekrars* as a bar to his claim to be *Gaddinishin Mohunt* inconsistent therewith.

Quaere: As to the power of a *Mohunt* who has a number of separate *asthals*, which by usage have all been held by one man, to provide for their division between his successors, or to saddle the property of one or more of the component *asthals* with a reservation in favour of the others.

Semble: As the essence of the law governing these *Mutts* lies in the following of custom or usage, *prima facie*, such a separation would be improper unless there were special circumstances justifying it.

When two parties enter into an agreement, whether it be of compromise or in some other respect, each procures the advantage of the agreement from the other, and no further advantage need be looked for to support the agreement.

Where the later wills contain no revoking clause and they effect nothing, so that there is no inconsistency between them and the earlier will, the latter must stand It would not be necessary to invoke the doctrine of defendant, relative revocation to such a case.

Appeal No. 134 of 1927 from a decree of the High Court, Calcutta, (Walmsley and Page, JJ.), dated the 27th February, 1925, which reversed a decree of the Court of the Subordinate Judge of Midnapore, dated the 27th November, 1922.

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The facts of the case are fully set out in the judgments of the High Court reported in *Gobinda Ramanuj Das Mohanta* v. *Ram Charan Das*,[1] and they are also sufficiently fully stated, for the purposes of the present report, in the judgment of the Privy Council.

Dunne, K.C. and *Hyam* for appellant.

De Gruyther, K.C. and *Wallach* for respondents.

During the course of the argument, Lord Phillimore referred to the case which their Lordships decided the other day as regards the appointment of a *Guru*, (see *Manickavachaga Desikar and others* v. *Paramasivan*,[2] decided on 30th November, 1928, and since reported in . . . . . .).

17th December, 1928. Their Lordships' judgment was delivered by

Lord Phillimore.

LORD PHILLIMORE.—In the District of Midnapur there is a *Mutt* or charitable endowment of ancient foundation, and this appeal concerns a dispute as to the title to the office and emoluments of the *Mohunt* of this *Mutt*.

Nothing is known of its earlier history. There is a deed of gift in the year 1841 to one Lachhman being then *Mohunt*. And he on the 11th September, 1878, appointed Bharat Das, his disciple, to be his successor in the office. The document is in the form of a letter attested by various witnesses and addressed to the appointee, and the appointment is *per verba de præsenti;* but the document is described as a will and was registered as such, and the appointment was only to operate upon the death of the appointer. In this document Lachhman describes himself as the *Guddinashin Mohunt* for the well-known *Akhra* named *Bara Asthal*, wherein two known idols, Raghunathjiu and Gopinathjiu and other idols have been installed from the time of his predecessors and to which certain other *asthals* described in the schedule, and also in his possession, are said to be subordinate, of all of which he is owner and manager. Five *asthals* or houses are mentioned in the schedule.

Lachhman died and was succeeded by Bharat, and Bharat in turn died on 27th August, 1918. He had on 24th February, 1908, executed an appointment of his successor. The document is in the same form as that by which he himself was appointed, and must be deemed to be a will. In it he describes himself as *Gaddinashin Chela* of the *Mohunt* Lachhman, and recites his own appointment, and makes Gobinda Ramanuj, the plaintiff in the present suit and a respondent in this appeal, chief *Chela* and

1. (1925) I.L.R. 52 Cal 748. 2 I L.R. (1928) 56 M.L.J. 121 (P.C.).

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Malik and *Gaddinashin Mohunt* like himself. To this document a schedule is appended in the same form as the schedule to the previous document containing the names and descriptions of the five minor *asthals*.

Ten years later, in 1918, Bharat executed two new wills. Both are dated as at the same day, but internal evidence shows that they were not intended to be deemed simultaneous, and enables their Lordships to fix their sequence. The first was addressed to Ramanuj. It recites that Ramanuj is the object of his affection and his *Chela*, but states that the appointer has also another disciple named Gobinda Das Rasuya, and that in the apprehension that in future there may not be good feeling between the two Chelas after the appointer's death, he is making a will according to the terms which follow. The will then proceeds to name Ramanuj Shebait-Paricharak Mohunt with the income of all the properties dedicated for the *Shebas* of one of the minor *asthals*, and in addition with two *bighas* of land taken from one of the other *asthals*, and gives to him the ornaments of the idols of the bequeathed *asthal* and its other possessions, to be enjoyed after the appointer's death by Ramanuj his *Chelas* and *par-Chelas* in succession.

The will then proceeds to speak of the *Bora* (or greater) *asthal* as being the original *Gaddi* of the former *Mohunts* and to require the appointee and his successors to pay one hundred rupees per year to this principal *Gaddi*.

The will does not in terms say who is to be the *Mohunt* of the principal *Mutt*, but it obviously contemplates the appointment of Rasuya because it goes on to provide that if either of the two die before appointing a successor, the surviving *Mohunt* should take his place and become *Mohunt* of the whole.

The second will is in a similar form and is addressed to Rasuya. It recites that the appointer has the two *Chelas*, and that he has executed a will to the effect that out of the properties which he owns and possesses as *shebait* he has made over the two *bighas* of land and the properties appertaining to the particular minor *asthal* to Ramanuj, and proceeds to bequeath all the rest of the property of which he is possessed to Rasuya, appointing him *Gaddinashin Mohunt* like himself, nominating him *Malik* of the *asthal* and providing that he should continue in possession down to his *Chelas* and *par-Chelas* in succession. The will further provides that Rasuya shall for the benefit of the *shebaits* of the principal idols receive the sum of one hundred rupees a year from the other *Mohunt*, who is described as he is described

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in the other will as the *Paricharak Mohunt* of the particular idols appertaining to the minor *asthal*. The will concludes with a clause similar to that in the other will providing that in case either *Mohunt* dies without appointing a successor, the other *Mohunt* shall succeed.

Shortly after executing these wills Bharat died, and disputes then arose between the two nominees.

An arrangement, however, was effected and embodied in two *ekrarnamas* executed on 29th January, 1919, whereby the provisions of Bharat's two wills were recognised and each of the parties entered into possession of their respective offices as conferred by the wills. Rasuya did not live long after this arrangement, and died on 18th February, 1920, having by will of that date appointed the defendant, Ramcharanan Das Rasuya, the present appellant, his successor.

Thereupon the plaintiff launched the present suit, making a claim to be the sole *Mohunt*, and supporting his claim by various allegations. First he said that as senior *Chela* of Bharat he was entitled as of right to be his successor and could not be ousted by a will. Then he said that the two wills of 1918 were brought into existence by fraud and undue influence, and that Bharat had not at the time of their execution a sound disposing mind. Further, he contended that the will of 1908 was irrevocable. Next he said that the two appointments were *ultra vires* and illegal, and that the *Mutt* consisting of the various *asthals* could not be divided, and that if these two wills were set aside the earlier will by which he had been appointed sole *Mohunt* prevailed, or that if there was an intestacy his title as senior *Chela* prevailed; and finally he attacked the appointment of Rasuya on the ground that his alleged testator had died without making a will and therefore, even if the wills of 1918 stood, he, the plaintiff, was entitled to succeed under the clause of the will, which provided that in the event of either of the two *Mohunts* dying without appointing a successor, the other *Mohunt* should succeed. As to the compromise effected by the *ekrarnamas*, he said in substance that no compromise could affect the title to an office.

The Subordinate Judge decided all these points against the plaintiff and dismissed the suit. On appeal the learned Judges agreed with the Subordinate Judge that the plaintiff could not claim the appointment as of right by reason of his being chief *Chela*, and that the document of 1908 was a will and was revocable. The allegation that the wills of 1918 were

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obtained by undue influence, and that Rasuya had died without making a will do not appear to have been pressed before the High Court.

The High Court, however, decided in favour of the plaintiff on the following grounds. The Court held that the appointments in 1918 were *ultra vires* and illegal, and must be set aside. The Judges treated the wills of 1918 as having revoked the will of 1908, but they treated it as a case of dependent, relative revocation, and thought that in accordance with this doctrine the will of 1908 prevailed. The Judges were inclined also to think that if no will stood the plaintiff had a title to the succession as chief *Chela*, and it is right to add that one of the learned Judges, Page J., attached considerable importance to this title, and only agreed with some hesitation to the view held by his colleague and by the Subordinate Judge that this title could be displaced by a will. As to the compromise as expressed in the *ekrarnamas*, they held that no estoppel was effected thereby.

With regard to the defence, which is founded upon the *ekrarnamas*, the reasoning of the learned Judges in the High Court is not easy to follow. When two parties enter into an agreement, whether it be of compromise or in some other respect, each procures the advantage of the agreement from the other, and no further advantage need be looked for to support the agreement. As far as the two parties to the agreement are concerned, each obtained for himself the benefit of an unquestioned title, and prevented himself from questioning the other's title to his respective office; and the present defendant as privy in estate with Bara Gobinda would appear to be equally entitled to take advantage of the agreement.

It might be, however, that owing to the form of this particular suit the agreement would not constitute a defence, because in form the suit is not brought by Gobinda Ramanuj, but by the two idols acting through him as their alleged *Shebait*—an idol being a juridical entity in Indian Law (see *Vidya Varuthi Thirtha* v. *Balusami Aiyar*[3].) If it were necessary to pursue this matter, it would be proper to enquire whether Ramanuj could by claiming to use the name of the idols as plaintiffs prejudge and preclude any issue which would bear upon the question of his title to be *Gaddinashin Mohunt*. But in their Lordships' opinion the defendant can succeed upon other grounds.

3. (1921) L.R. 48 I.A. 302 at 311: I.L.R. 44 M. 831: 41 M.L.J. 346 (P.C.).

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If the wills of 1918 were inoperative their Lordships would agree with the learned Judges in the High Court that the will of 1908 would stand. It would not be necessary in their Lordships' view to invoke the doctrine of dependent, relative revocation, because there is no revoking clause in the wills of 1918, and the will of 1908 would be only revoked by reason of, and to the extent of, its inconsistency with the later wills, and if the later wills effect nothing the older will must stand.

It becomes, therefore, a question whether the later wills were *ultra vires* and therefore ineffectual. The Judges in the High Court treated the two wills as being equivalent to one document, and as purporting to divide a *Mutt* which they stated would be illegal. They relied upon the authority of this Board in the case of *Sethuramaswamiar* v. *Meruswamiar*.[4] But neither this case nor the earlier one of *Jaafar Mohiudin Sahib* v. *Aji Mohiudin Sahib*[5] to which their Lordships have referred, touch the present case. They were cases where the office of *Mohunt* or a similar office was hereditary, but the *Mohunt* being a member of an undivided Hindu family, the other members of the family claimed to share in the endowments and if necessary to have a partition; and what was determined was that the endowments went with the office and were to be enjoyed by the office-holder without partition between him and the members of his family. There is no direct authority as to the power of a *Mohunt* who has a number of separate *asthals*, which by usage have all been held by one man, to provide for their division between his successors, or to saddle the property of one or more of the component *asthals* with a reservation in favour of the others. All that can be safely said is that as the essence of the law governing these *Mutts* lies in the following of custom or usage (*see* the case in *Vidya Varuthi Thirtha* v. *Balusami Aiyar*[3] already cited), *prima facie* such a separation would be improper, unless there were special circumstances justifying it. But their Lordships desire to be understood as expressing no determination upon this point, as in their view it is unnecessary. They look at the two wills as separate documents, and they find in one of them an effectual appointment of the defendant-appellant to be *Gaddinashin Mohunt*, with some reservations added which may or may not be valid. The existence of these reservations and their appearance as a positive bequest in the other will does

3. (1921) L.R. 48 I.A. 302: I.L.R. 44 M. 831: 41 M.L.J. 346 (P.C).
4. (1917) L.R. 45 I.A. 1: I.L.R. 41 M. 296: 34 M.L.J. 130 (P.C.).
5. (1864) 2 M.H.C.R. 19.

not detract from the definite appointment which, in their Lordships' view, was effectually made. The defendant-appellant was lawfully created *Gaddinashin Mohunt.* He puts forward no claim to the minor *Mohuntship,* which was bequeathed to the plaintiff-respondent.

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In their Lordships' opinion, the Subordinate Judge was right in his decision, and they will humbly advise His Majesty that this appeal should be allowed and that the suit should be dismissed with costs here and below.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Watkins & Hunter.*

K.J.R. *Appeal allowed*

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Straits Settlements, Singapore.]

PRESENT:—VISCOUNT SUMNER, LORD BLANESBURGH AND LORD WARRINGTON OF CLYFFE.

Tan Chew Hoe Neo .. *Appellant**

v.

Chee Swee Cheng and others .. *Respondents.*

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Tan Chew Hoe Neo
v.
Chee Swee Cheng.

Joint tenancy—Tenancy-in-common—Sale deed—Purchasers under—Tenancy created between—Description of purchasers as "merchants"—Effect—Maxim "Inter mercatores jus accrescendi locum non habet"*—Applicability—Conditions—Severance of joint tenancy—Modes of, in English Law—Evidence—Course of dealing leading to inference of severance between purchasers under a conveyance who were joint tenants—Parol evidence of—Admissibility—Straits Settlements Evidence Ordinance—S 92 (corresponding to S. 92 of Indian Evidence Act)—Effect.*

Under the will of a deceased person his four sons became entitled to shares in his residuary estate. *P,* one of the sons, had mortgaged his share. It was sold by the mortgagee, and was subsequently bought from the purchaser by the son of *P,* and the three other sons of the testator, under an indenture which recited that, in consideration of a sum stated to have been paid by the purchasers out of money belonging to them on a joint account, the share of *P* was conveyed to the said four persons as joint tenants absolutely. Each of the purchasers was in the deed described as a "merchant". The purchase money was raised by a mortgage of the purchased share and of certain other shares in the original testator's estate.

Held, that, according to the principles of English Law applicable to joint tenancy, the deed of conveyance created in terms a joint tenancy between the four purchasers.

One of the Judges in the Appellate Court was of opinion that the maxim *"Inter mercatores jus accrescendi locum non habet"* applied to the case, and accordingly held that the tenancy created by the deed was a tenancy-in-common.

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*P.C. Appeal No. 133 of 1927. 10th December, 1928.

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Held, that that view was untenable, because, though the purchasers were described in the deed as "merchants," there was no evidence at all that the purchase was in any way connected with their trade or indeed that they were jointly concerned in any trade.

With regard to the ways in which a joint tenancy may, under the English Law, be severed, their Lordships accepted the statement of Wood, V.C., in *Williams v. Hensman*, [(1861) 1 J. & H. 546, 557] as an accurate statement of the law.

S. 92 of the Evidence Ordinance of the Straits Settlements (which is the same as S. 92 of the Indian Evidence Act) does not exclude parol evidence of facts from which it may be inferred that, accepting a conveyance as creating a joint tenancy between the purchasers thereunder, those purchasers subsequently so dealt with their respective interests thereunder that the joint tenancy became a tenancy-in-common.

Held, that statements made by individual purchasers under a conveyance which in terms created a joint tenancy between them indicating that they respectively thought that there was no right of survivorship, and accounts proving a division of income after the deaths of some of the purchasers were insufficient of themselves to justify an inference of an agreement to sever between the purchasers.

Held, on the evidence, that a severance of the joint tenancy between the purchasers under the abovementioned conveyance had not been established.

Appeal No. 133 of 1927 from a judgment of the Supreme Court of the Straits Settlements, in Appeal (September 20, 1926), reversing a judgment of Murison, C.J.

G. B. Hurst, K.C. and *Langley* for appellant.

Gavin Simonds, K.C. and *Greenland* for respondents.

10th December, 1928. Their Lordships' judgment was delivered by

Lord Warrington of Clyffe.

LORD WARRINGTON OF CLYFFE.—The appellant, as the executrix of Eng, the last survivor of four persons, Hoon, Lim, Quee and Eng himself, claims to be entitled to certain property on the grounds that such property was conveyed to them as joint tenants and that the jointure has not been severed.

The respondents, the executors of Hoon, Lim and Quee respectively, claim that Hoon, Lim, Quee and Eng himself were entitled to the property in equal shares as tenants-in-common, either because, as they contended in the Courts below, they were originally tenants-in-common, or because they all pursued a course of conduct from which an agreement should be inferred on the part of them all to sever the jointure.

In the Courts of the Colony there was a remarkable difference of judicial opinion. Murison, C.J., before whom the action was tried, decided in favour of the appellant. In the Court of Appeal, Brown, J., agreed with the Chief Justice, but the majority (Deane and McCabe Reay, JJ.) took the opposite

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view, though for different reasons, and judgment was accordingly entered for the respondents. Hence this appeal.

The three persons shortly referred to as Hoon, Lim and Quee were brothers, and Eng was their nephew, being the son of another brother.

Under the will of their father Yam (hereinafter referred to as the testator), who died in the year 1862, his four sons, Hoon, Lim, Quee and Peck, became entitled to shares in his residuary estate. His estate was administered under a decree of the Court in an administration action.

Peck had mortgaged his share. In 1891 it was sold by the mortgagee and was subsequently bought from the purchaser by the four persons abovenamed.

By an indenture, dated June 28, 1892, in consideration of $18,000 stated to have been paid by the purchasers out of money belonging to them on a joint account, the share of Peck was conveyed to Hoon, Lim, Quee and Eng as joint tenants absolutely. Each of the purchasers was in the deed described as a "merchant."

The purchase money was raised by a mortgage of the purchased share and of certain other shares in the original testator's estate, which mortgage is dated June 29, 1892.

It was assumed on both sides in the argument before this Board that the principles of law applicable to joint tenancy, and the means whereby a severance of the jointure may be effected, are the same in this country and in the Colony, except only that the appellant contended that under section 92 of Ordinance No. 53 parol evidence leading to an inference of an agreement to sever the jointure is not admissible.

The effect of the conveyance of June 28, 1892, is, in their Lordships' opinion, beyond dispute. It created in terms a joint tenancy between the four purchasers. In fact, this was tacitly conceded by counsel in the argument before this Board. It is true that one of the Judges in the Court of Appeal was of opinion that the maxim, "*Inter mercatores jus accrescendi locum non habet,*" applied to the case, and accordingly held that the tenancy created by the deed was a tenancy-in-common. This view was not supported before this Board, and in their Lordships' opinion could not successfully be supported. The purchasers are, indeed, described in the deed as "merchants," but there is no evidence at all that the purchase was in any way connected with their trade or indeed that they were jointly concerned in any trade.

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The tenancy then was originally a joint tenancy. The remaining question is: Has the jointure been severed and the joint tenancy converted into a tenancy-in-common?

The law on this subject is stated as follows by Wood, V.C., in *Williams* v. *Hensman*[1]:

"A joint tenancy may be severed in three ways. In the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. . . Secondly, a joint tenancy may be severed by mutual agreement. And in the third place there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy-in-common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention with respect to the particular share, declared only behind the backs of the other parties interested. You must find, in this class of cases, a course of dealing by which the shares of all the parties to the contest have been affected."

Their Lordships accept this as an accurate statement of the law.

In this country such a course of dealing may be proved in the same way as any other relevant fact may be proved. But it has been contended, and the contention was accepted by some of the Judges in the Colony, that under section 92 of the Ordinance 53 (Evidence), parol evidence is not admissible to prove the fact in question. As will be seen hereafter, it is in strictness unnecessary to decide this point, but having regard to the difference of judicial opinion in the Courts below, their Lordships think it right to express their view on the subject.

Section 92 is as follows:

"When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document have been proved according to S. 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives-in-interest for the purpose of contradicting, varying, adding to, or subtracting from its terms"

The section is subject to provisos. Proviso 4 (1)* has been referred to, but in their Lordships' opinion has no bearing on the present question, inasmuch as in their view the section itself does not apply.

In the present case evidence is tendered, not for the purpose of contradicting or varying the terms of the conveyance, but of proving facts from which it may be inferred that, accepting the

1 (1861) 1 J. & H 546 at 557.

*(1) Proviso 4: "The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law to be in writing or has been registered according to the law in force for the time being as to the registration of documents."

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conveyance as creating a joint tenancy, the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy-in-common.

It remains then to determine whether on the wohle of the evidence as tendered the respondents have established facts from which an agreement to sever should be inferred. On this point it is necessary to state a few facts and dates:

On January, 26, 1894, by a deed of that date, the property comprised in the mortgage of June 29, 1892, was reconveyed by the mortgagee discharged from the mortgage. Nothing turns upon the terms of this deed.

In the year 1895, in pursuance of a liberty reserved in the decree for the administration of the estate of the original testator, certain members of the family carried in proposals for the purchase by them of certain items of the testator's estate, the purchase money or part of it being provided out of their respective shares in the estate.

Among these proposals was one on behalf of Hoon, Lim, Quee and Eng to purchase five houses as tenants-in-common for $4,600.

These houses were on June 3, 1895, conveyed to the four persons as tenants-in-common in equal shares, the conveyance reciting the deed of June 28, 1892, with its limitation to them as joint tenants.

One of the witnesses, Swee, says that when they were going to partition the testator's property, by which expression he obviously refers to the transaction just mentioned, he first heard that the words "joint tenancy" were in the deed of 1892, and that on their effect being explained to him by the solicitors he was surprised and called a meeting of the four persons concerned, and that they told him to go to the solicitors and get the proposals for sale of the property altered. "Instead of joint tenancy, I was to get them put on the basis of a tenancy-in-common." As mentioned above the proposal for the purchase of the five houses and the conveyance thereof to the purchasers were "put on the basis" of a tenancy-in-common, *viz.*, the houses were so conveyed, the instructions deposed to being confined to the particular case. Their Lordships cannot find so far anything from which a general intention or agreement to sever can be inferred.

The next event was the death of Hoon on September 28, 1903.

In 1905 Hoon's executors and the remaining three persons interested in the share in question were desirous of creating a

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trust of the share in favour of Peck and his children, if any. This was carried into effect by a deed poll dated May 1, 1905, to which Hoon's executors were parties and concurred in the declaration. It took the form of a covenant by them all, that they and the survivor of them would stand seised and possessed of the property assigned to them by the deed of June 28, 1892, upon certain trusts. It is said that Hoon's executors had no interest in this property except on the footing of a tenancy-in-common, and that the form of the deed therefore supports the theory of a severance. But this ignores the fact that the houses purchased in 1895 represented a part of the share assigned by the deed of 1892, and the concurrence of Hoon's executors was necessary in regard to these houses. In this deed also the limitation to the four as joint tenants is referred to and no suggestion of a severance is made.

On November 24, 1906, Quee died, and on December 18, 1907, Lim died, Eng becoming thus the survivor of the four joint tenants.

By a deed poll, dated October 19, 1908, new trustees of the deed of 1905 were appointed, and by this it is made clear that the three houses remaining unsold of the five purchased in 1895 were included in the trust.

Their Lordships can see nothing in these last-mentioned transactions from which a severance can be inferred.

The remainder of the evidence consists of certain statements made by individual members of the quartette, including Eng, which, it is said, indicate that they respectively thought that there was no right of survivorship, together with certain accounts which, it is said, prove a division of income after the deaths of those who died before Eng. Their Lordships cannot accept the evidence afforded by these statements and accounts as sufficient of themselves to justify an inference of an agreement to sever.

The result is that, in the opinion of their Lordships, this appeal ought to be allowed, the order on appeal reversed, and that of Murison, C.J., restored, with costs to be paid by the respondents. The costs in the Court of Appeal were made payable out of Peck's share in the testator's estate, and their Lordships see no reason for interfering with that order. They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Peacock & Goddard.*

Solicitors for respondents: *Nisbet, Drew & Loughborough.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Murugesa Mudaliar .. *Petitioner* in C.M.P. No.* 4205 *of* 1928 *and Respondent in C.M.P. No.* 4401 *of* 1928—*Plaintiff in O.S. No.* 58 *of* 1928 *and Defendant in S.C. No.* 210 *of* 1928.

v.

Davva Venkata Kesavalu Chetty .. *Respondent in C.M.P. No.* 4205 *of* 1928 *and Petitioner in C.M.P. No.* 4401 *of* 1928—*Defendant in O.S. No.* 58 *of* 1928 *and Plaintiff in S.C. No.* 210 *of* 1928.

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Civil Procedure Code (V of 1908), *S* 24 (4)—*Small Cause suit pending in the Court of Subordinate Judge—District Munsif with limited Small Cause jurisdiction—Valuation of Small Cause suit higher than the Small Cause jurisdiction of the District Munsif—Jurisdiction of High Court to transfer the Small Cause suit to the Court of the District Munsif.*

An order of transfer passed under sub-clause (4) of section 24 of the Civil Procedure Code cannot invest a Court not having Small Cause jurisdiction with one; nor can such an order enable a Judge having Small Cause jurisdiction up to a particular limit to try, as a Small Cause suit, a suit exceeding that limit. Consequently, the High Court has no power to transfer a Small Cause suit pending on the file of the Court of a Subordinate Judge to the Court of a District Munsif where the Small Cause jurisdiction of the District Munsif is less than the value of the Small Cause suit.

C.M.P. No. 191 of 1917, followed.

Sankararama Aiyar v. *Padmanabha Aiyar,* (1912) I.L.R. 38 M. 25: 23 M.L.J. 373, *Chhotey Lal* v. *Lakhmi Chand Magan Lal,* (1916) I.L.R. 38 A. 425 and *Sukha* v. *Raghunath Das,* (1916) I.L.R. 39 A. 214 explained and distinguished.

Madhusudan Gope v. *Behari Lall Gope,* (1918) 44 I.C. 881 not followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the transfer of S.C.S. No. 210 of 1928 on the file of the Court of the Subordinate Judge of Bezwada to the District Munsif's Court, Ranipet, to be tried along with O.S. No. 58 of 1928 on its file, or to direct stay of trial of the said S.C.S. No. 210 of 1928 pending the said O.S. No. 58 of 1928 and C.M.P. No. 4401 of 1928 and praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct the transfer of the said O.S. No. 58 of 1928 from the file of the Court of the District Munsif of Ranipet to the file of the Court

*C.M.P. Nos 4205 and 4401 of 1928. 26th February, 1929.

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of the Subordinate Judge of Bezwada to be heard along with S.C.S. No. 210 of 1928 on its file.

K. S. Desikan for petitioner.

P. Satyanarayana Rao for respondent.

The Court made the following

ORDER.—These are Civil Miscellaneous Petitions for transfer of certain suits pending in the Court of the District Munsif of Ranipet and the Court of the Subordinate Judge of Bezwada, respectively. The petitioner in C.M.P. No. 4205 of 1928 is Murugesa Mudaliar, plaintiff in Suit No. 58 of 1928 on the file of the District Munsif's Court, Ranipet (North Arcot District). He filed that suit against D. Venkata Kesavalu Chetty to recover a sum of Rs. 870 alleged to be due in respect of goods (brass vessels) supplied by him to the defendant. After the suit in Ranipet Court was decreed *ex parte* it is alleged that the defendant therein (Venkata Kesavalu Chetty) filed Small Cause Suit No. 210 of 1928 on the file of the Sub-Court, Bezwada (Kistna District) against Murugesa Mudaliar to recover Rs. 542 alleged to be due in respect of the same dealings in brass vessels. The *ex parte* decree passed by the District Munsif of Ranipet was subsequently set aside and the suit posted for hearing.

Murugesa Mudaliar, the plaintiff in the Ranipet suit, has applied for the transfer of the Small Cause Suit No. 210 of 1928 from the file of the Court of the Subordinate Judge of Bezwada to the file of the District Munsif of Ranipet to be tried along with Original Suit No. 58 of 1928 on the file of the District Munsif. Venkata Kesavalu Chetty, the plaintiff in Small Cause Suit No. 210 of 1928 on the file of the Subordinate Judge of Bezwada, has applied for the transfer of Original Suit No. 58 of 1928 from the file of the District Munsif of Ranipet to the file of the Court of the Subordinate Judge of Bezwada to be heard along with Small Cause Suit No. 210 of 1928 on the file of the Subordinate Judge.

Interim stay has been granted in respect of both the suits, and the above petitions have now come on for final disposal. I have heard Mr. Desikan on behalf of the plaintiff in the Ranipet Munsif's Court suit, and Mr. P. Satyanarayana Rao on behalf of Venkata Kesavalu Chetty, the plaintiff in the Sub-Court suit.

The first question that has to be considered is whether there is jurisdiction to transfer the Small Cause suit now pending before the Subordinate Judge of Bezwada to the District

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Munsif of Ranipet (seeing that the value of the Small Cause suit is Rs. 542 whereas the Small Cause jurisdiction of the District Munsif of Ranipet is only Rs. 100, that is less than Rs. 542). It is contended by Mr. Desikan that under section 24, clause (4), Civil Procedure Code, the transfer could be made and that the result of the transfer would be that the transferred suit should be tried as a Small Cause suit by the District Munsif, and that there is no valuation limit regarding suits that could be so transferred prescribed by sub-clause (4) of section 24. He drew my attention to the cases reported in *Sankararama* v. *Padmanabha*,[1] *Chhotey Lal* v. *Lakhmi Chand Magan Lal*[2] and *Sukha* v. *Raghunath Das*.[3] On the other hand Mr. Satyanarayana Rao contended that the Small Cause jurisdiction of the District Munsif of Ranipet being less than the value of the suit at Bezwada, the District Munsif has no jurisdiction to try the Bezwada suit as a Small Cause suit. He referred to clause 1 (*b*) (ii) of section 24, Civil Procedure Code, which lays down that the Court to which a suit is transferred should be competent to try that suit.

Turning to the decisions quoted by Mr. Desikan I find that the decision in *Sankararama* v. *Padmanabha*[1] is not a decision on the point I am now considering. There the District Judge of Tinnevelly transferred a Small Cause suit pending before the Subordinate Judge of Tuticorin to the District Munsif of Srivaikuntam to be tried as an original suit. The suit was again transferred to the file of the Additional District Munsif of Tinnevelly, who tried it as an original suit and whose decision was on appeal reversed by the Appellate Court. The question before the High Court was whether an appeal lay against the decision of the Additional District Munsif of Tinnevelly. The learned Judges of the High Court held, that having regard to clause (4) of section 24, the Additional District Munsif should be deemed to have tried the suit as a Small Cause suit and that the directions issued by the District Judge to have it tried as an original suit are illegal and issued without jurisdiction. The High Court accordingly held that the said directions should be disregarded as not being warranted by section 24, and that it must be taken that the suit was tried by the District Munsif as a Small Cause suit. No question was raised before the High Court whether the said suit could have been transferred to the District Munsif at all because he had no jurisdiction

1. (1912) I.L.R. 38 M 25: 23 M.L J. 373
2 (1916) I.L.R. 38 A. 425. 3 (1916) I.L.R. 39 A. 214

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to try such suit on account of the valuation of the suit. From the report it does not appear that any objection on the score of the valuation was raised and pressed before the High Court. It is no doubt true that at page 27 of the report in the judgment of Mr. Justice Sundara Aiyar the following sentence occurs:

"It is no doubt the fact that the Srivaikuntam Munsif had not been invested with jurisdiction to try Small Cause suits of the value of this suit."

It does not appear, however, whether the Additional District Munsif of Tinnevelly who ultimately tried the suit had such jurisdiction. In any event this question of want of jurisdiction on the score of valuation was not made a ground of attack before the High Court and the High Court does not deal with such an objection so that I am not able to derive any help from that decision. The next case relied on is *Chhotey Lal* v. *Lakhmi Chand Magan Lal.*[2] That was a decision of a single Judge, Sir P. C. Banerji, J.; from the facts set out at page 426 it appears that a suit for Rs. 282 filed as a Small Cause suit in the Court of the Subordinate Judge of Muttra, whose Small Cause jurisdiction extended up to Rs. 500, was transferred by order of the District Judge to the District Munsif of Muttra whose Small Cause jurisdiction extended only up to the limit of Rs. 50. An *ex parte* decree was passed by the Munsif. The defendant applied to have the *ex parte* decree set aside, and the question arose whether he ought to have deposited the decree amount or given security for the same, under section 17 of the Provincial Small Cause Courts Act, at the time of presenting the application. The Munsif having held that the section did not apply, and having granted the defendant's application, and having set aside the *ex parte* decree, the plaintiff filed a revision petition. The learned Judge stated the question for decision as follows: "The real question in this case is whether section 17 of the Small Cause Courts Act applies to the present case." No objection was raised on the ground that the District Munsif had no jurisdiction to try the suit having regard to its valuation. The Court relied on cl. (4) of section 24 and held that the decision of the District Munsif should be taken to have been passed by a Court of Small Causes and that the provisions of section 17 of the Small Cause Courts Act applied. The next case relied on is the one reported in *Sukha* v. *Raghunath Das.*[3] There, the District Judge transferred a Small Cause suit pending in the Subordinate Judge's

2. (1916) I.L.R. 38 A. 425. 3. (1916) I.L.R. 39 A. 214.

Court of Muttra; the District Munsif to whose Court the case was transferred was not invested with the powers of a Small Cause Court Judge. He however tried the case as a Small Cause Court Judge and decreed the claim in plaintiff's favour. The defendant's appeal was dismissed by the Lower Appellate Court on the ground that no appeal lay. The defendant filed a revision petition before the High Court, and the only point argued before the High Court was whether an appeal lay or not. The High Court held that having regard to section 24, clause (4), Civil Procedure Code, the District Munsif should be taken to have decided the suit as a Court of Small Causes and that no appeal lay against his decree. The question whether a Small Cause suit could be transferred to a Court which was not either a Court of Small Causes, or one invested with jurisdiction of a Court of Small Causes, does not seem to have been argued or decided by the High Court in that case. No doubt there is an observation at page 221 of the report:

> "The Legislature apparently intended that the District Court should have power to make an order of transfer such as has been made in the present case, trusting to the discretion of that Court, and its knowledge of local conditions, not to make an order of transfer to a Court not competent to make a proper exercise of the special powers which an order of transfer carries with it in respect of particular cases so transferred."

If the learned Judge meant by the above observation that a Small Cause suit could be transferred by a District Court to the file of a District Munsif's Court which was not a Small Cause Court and which was not invested with Small Cause jurisdiction, it seems to me with all respect that the proposition is unsustainable. The same remarks apply to the decision of Mr. Justice Lindsay reported in *Ram Charan Banwari Lal* v. *Kishori Lal Sarup*.[4] The only question raised was whether an appeal lay. The decision in *In re Bagiammal*[5] seems to be relevant. A suit pending on the file of the Court of Small Causes, Madras, was transferred by a Bench of two learned Judges of the High Court by order passed, under section 24, clause (4) of the Code of Civil Procedure on C.M.P. No. 2446 of 1916 to the City Civil Court to be tried with Original Suit No. 277 of 1916 pending in the City Civil Court. The correctness of the order being doubted, having regard to the provisions of section 24 (1) (*b*) (ii), the Chief Justice was moved by C.M.P. No. 334 of 1917 to regularise the proceedings by passing order under section 5 (2) of the City Civil Court

4. (1928) I.L.R. 50 A. 810. 5. (1917) 32 M.L.J. 258.

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Act. The learned Chief Justice (Sir John Wallis, *Kt.*), in passing order under section 5 (2) of the City Civil Court Act and directing the transfer, observed as follows:

"Section 24 of the Code of Civil Procedure only authorises transfer to a Court competent to try the case The City Civil Court is not such a Court (section 3 of the City Civil Court Act) and I do not think that S 24. clause (4) of the Code of Civil Procedure makes it so. It can only become so by the Chief Justice of the High Court authorising the City Civil Judge to try the case in his capacity of Small Cause Court Judge under section 5 (2) of the City Civil Court Act. I so direct him"

In *Manikka Chettiar* v. *Kuppuswami Naicker*[6] the present learned Chief Justice remarks at page 118 as follows: "I can only transfer them to a Court which has jurisdiction to try them." Under section 24 (1) (*b*) (ii) of the Code of Civil Procedure the Court to which a suit is transferred should be competent to try or dispose of the same. Competency clearly means with reference to the nature and the amount or value of the subject-matter of the suit. In fact, these last words occurred in the previous Code of 1882, section 25, and have been omitted from section 24 of the present Code evidently as unnecessary since the presence of the word 'competent' in clause 1 (*b*) (ii) of the section clearly implies the same. A Court may not be competent to try Small Cause suit either because of the valuation of the suit or because it had no Small Cause jurisdiction at all. I cannot agree with the contention that an order of transfer passed under sub-clause (4) of section 24, Civil Procedure Code, could invest a Court not having Small Cause jurisdiction with one; nor could such an order enable a Judge having Small Cause jurisdiction up to a particular limit to try, as a Small Cause suit, a suit exceeding that limit. Otherwise, a District Court could in this Presidency at present transfer a Small Cause suit, of the value of say Rs. 1,000 pending before a Subordinate Judge to be tried by a District Munsif as a Small Cause suit, though the jurisdiction of District Munsifs is limited under notification issued by the Local Government under the provisions of Small Cause Courts Act and the Madras Civil Courts Act, to the trial of Small Cause suits not exceeding Rs. 300 in value. Similarly a Judge of the High Court could transfer a suit of the value of Rs. 2,000 from the file of the Presidency Small Cause Court to a District Munsif to be tried as a Small Cause suit. But as already mentioned it is only the Local Government that has the jurisdiction under section 15 of the Provincial Small Cause Courts Act to invest particular Courts of Small Causes with

6. (1926) 25 L.W. 115.

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jurisdiction up to Rs. 1,000; and under section 28 of the Madras Civil Courts Act it is only the High Court (and not one Judge thereof) that has got jurisdiction by notification in the official Gazette to invest District Munsifs with Small Cause jurisdiction, and that only up to the amount of Rs. 300. It therefore seems rather curious that a District Court or a division bench of the High Court should have power to direct District Munsifs to try suits of the value of Rs. 1,000 and 2,000 respectively as Small Cause suits. It should not be forgotten that no appeals lie against the decree passed in such suits. The above considerations were pressing upon me when the question was argued before me. In none of the cases quoted before me has this question of competency been expressly raised and decided. If the case in *Sankararama* v. *Padmanabha*[1] had decided this question, I should of course be bound by the same. But for reasons already mentioned by me, this question was not raised in that case, much less decided by the learned Judges. I accordingly took time to consider my judgment in this case, and in the meantime asked the Office to find out whether any similar cases had arisen for decision after the rulings reported in *Sankararama* v. *Padmanabha*.[1] I am obliged to the Office for having brought to my notice the following case which I think helps me in the decision of the point.

In C.M.P. No. 151 of 1917, the High Court was moved by the defendants in Small Cause Suit No. 16870 of 1916 on the file of the Court of Small Causes, Madras, to transfer the said suit to the Principal District Munsif's Court of Bapatla to be tried along with Original Suit No. 722 of 1916 on the file of that District Munsif. As generally happens in such cases, the subject-matter of the two suits was practically the same, and the evidence in both the suits was practically the same; the High Court, Oldfield and Bakewell, JJ., by order, dated 5th February, 1917, ordered the transfer as prayed for. It was subsequently found out that the value of Small Cause suit was Rs. 1,627-4-6 and an application for review was filed immediately by the plaintiff in the Presidency Small Causes Court on the ground of valuation of the suit and the consequent incompetency of the Munsif to try the said suit. The learned Judges reviewed the prior order, and on 16th February, 1917 passed the following order:

"As the fact that the respondent's case could not ordinarily be disposed of by the District Munsif sitting as a Small Cause Court was over-

1. (1912) I.L.R. 38 M. 25: 23 M.L.J. 373.

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looked, we allowed the review petition Proceeding at once with the consent of the parties to our hearing of the application for transfer, we hold that it should not be granted in the circumstances and dismiss it. No orders as to costs."

This clearly is a decision by two learned Judges of the High Court on the exact point now before me. Though the learned Judges have not elaborated the reasons for their opinion, it is clear that the considerations set out by me above receive support from the order passed by the learned Judges. The question raised before me relates to an important matter of practice of frequent occurrence and there should be no doubt on such a matter of practice. Having regard to the decision of the two learned Judges mentioned above, and the other considerations mentioned by me already I have come to the conclusion that the Small Cause suit now pending before the Subordinate Judge of Bezwada should not be transferred to be tried by the District Munsif of Ranipet. These considerations have not been considered in the decision of the Calcutta High Court reported in *Madhusudan Gope* v. *Behari Lall Gope.*[7] The Court there refers only to section 24 (4) and not to the provisions of section 24 (1) (*b*) (ii) relating to the competency of the Court to which the suit is transferred. In any event I should not prefer the same to the decision of this Court mentioned above. Coming to the Petition No. 4401 of 1928 filed by Venkata Kesavalu Chetti, the plaintiff in the Bezwada suit, I note that the suit in Ranipet was filed first; and it was open to Venkata Kesavalu Chetti to have filed either a separate suit in the Ranipet Court, within whose jurisdiction Murugesa Mudaliar was living, claiming the amount due to him according to his version. He might also, for what appears, have filed a counter-claim in respect of his demand. It is not clear to me that the effect of transferring Suit No. 58 of 1928 to the file of the Subordinate Judge would really lead to a satisfactory solution of conflict of decisions; for if the decision of the Subordinate Judge passed on the transferred suit be open to appeal, then the findings passed on such an appeal need not necessarily be the same as the findings arrived at by the Subordinate Judge in the two suits. Should, however, it be held that no appeal lies from the decision of the Subordinate Judge on the transferred suit (see *Uma Charan Sen Gupta* v. *Chinta Roy*[8]) then in the circumstances of this case it seems to be really unjust that the plaintiff in the Ranipet Court who filed the suit for the larger amount

7. (1918) 44 I.C. 881.

8. (1916) 36 I.C. 881.

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and that long before the other side filed the Small Cause suit in the Bezwada Subordinate Judge's Court should have to forego the right of appeal from any decision that might be passed by the Ranipet Court; in the circumstances of this case I do not feel justified in bringing about such a result. I therefore dismiss Venkata Kesavalu Chetti's Application No. 4401 of 1928.

One of the prayers in C.M.P. No. 4205 of 1928 filed by the plaintiff in the Ranipet suit is that the proceedings in Small Cause Suit No. 210 of 1928 on the file of the Subordinate Judge of Bezwada may be stayed pending disposal of the Ranipet suit. In the circumstances I think that is a prayer that I should grant. I accordingly direct that the proceedings in Small Cause Suit No. 210 of 1928 on the file of the Subordinate Judge of Bezwada be stayed pending disposal of Suit No. 58 of 1928 on the file of the Court of the District Munsif of Ranipet. The question whether the stay of Suit No. 210 of 1928 should be continued in case of an appeal against the decision of the Ranipet Court will have to be considered, if necessary, later on, having regard to the circumstances then existing.

I make no order as to costs in any of these petitions.

N.S. *Prayer for transfer refused but suit stayed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE THIRUVENKATACHARIAR.

P. M. Ramakrishna Aiyar .. *Appellant** (*Plff.*)

v.

P. Muthuswami Aiyar and others .. *Respondents* (*Defts.* 1 *to* 4 *and* 6).

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Partnership—Retirement of one partner—Business of the firm carried on by the others with its capital or assets—Absence of settlement of account between the retiring partner and the others—Effect—Option of retiring partner to claim share of profits or interest—Utilisation of portion of assets alone in the business—Effect—Election—Essentials for the application of the doctrine—Election by the retiring partner—Right to postpone election till the taking of final accounts—Hindu Law—Joint family—Division in status—Liability of manager to account for subsequent management.

When a partner retires from the firm and the business of the firm is thereafter carried on by the other members of the firm with its capital or assets without any final settlement of accounts as between them and the outgoing partner, then, he, in the absence of any agreement to the contrary, is entitled at his option either to claim a share of the profits made with the use of his share of the partnership assets since the dissolution of the firm by his retirement or to interest on the amount of his

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*Appeal No 337 of 1926. 14th December, 1928.

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share in the partnership as it stood on the date of its dissolution. It is not necessary that the whole of the partnership assets should have been used in making the subsequent profits; even if a portion of the assets have been so used, the retiring partner who has a share in every portion of the partnership assets is entitled to a similar share in the profits

Bhagwandas Mitharam v. *Rivett-Carnac,* (1898) L.R. 26 I.A. 32: I.L.R. 23 Bom. 544 (P.C.) relied on.

Ahmed Musaji Saleji v *Hashim Ebrahim Saleji,* (1915) L R 42 I.A. 91: I.L.R. 42 Cal. 914: 29 M.L.J. 70 (P.C.) distinguished

Haji Hedayetulla v. *Mahomed Kamil,* (1923) 19 L.W. 425 (P.C.) referred to.

Hajee Summar Sait v. *Mahomed Husshum Sait,* (1916) 4 L.W. 521 not followed.

A person cannot be required to elect between two things unless he is in a position to know what these two things are and can make a voluntary choice between them. Consequently, a retiring partner is not bound to make his election as to whether he would claim a share of the profits made with the use of his share of the partnership assets since the date of the dissolution of the firm by his retirement or interest on the amount of his share in the partnership as it stood on the date of its dissolution, until the share of the profits that would fall to him has been ascertained, in other words, his final election must be postponed until the accounts of the business subsequent to his retirement have been taken.

Per Phillips, J.—It is often difficult to ascertain the exact share of the retiring partner in the profits to be awarded to him and it may therefore be more proper in such cases to award interest on the share of the assets at the date of the dissolution.

The manager of a joint Hindu family is under an obligation to account for his management of the whole of the family property even after the date of division in status, he being co-owner in possession of the property of the separated member of the family

Per Thiruvenkatachariar, J—It is not open to the retiring partner, in making the election, to claim a share of the profits with regard to a portion of the assets utilised by the other partners in the firm after the date of his retirement and to claim interest with regard to the rest. He must choose between the alternative reliefs with regard to the entire assets as a whole.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, dated 12th May, 1926, in Original Suit No. 18 of 1924.

T. M. Krishnaswami Aiyar and *S. Anantarama Aiyar* for appellant.

T. R. Ramachandra Aiyar, S. Varadachariar, K. R. Rangaswami Aiyangar and *N. Sivaramakrishna Aiyar* for respondents.

The Court delivered the following

Phillips, J.

JUDGMENTS. *Phillips, J.*—Plaintiff and defendants 2 and 3 are the sons of the 1st defendant. They conducted a partnership business, at first in conjunction with the 4th defendant, and subsequently as a family partnership consisting of themselves alone. Misunderstandings arose in 1920 and plaintiff refused

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to continue in the business and finally expressed his determination to become separated in status and to dissolve the partnership. It has been found in the Lower Court that this separation in status and the dissolution of partnership took place on the 31st December, 1921, and this is not now disputed. The plaintiff's suit is for the recovery of his share in the family property and in the partnership assets. He has obtained a decree for one-fourth share in the partnership assets as they stood on the 31st December, 1921 and for one-fourth share of the immoveable and moveable properties belonging to the family. So far as his share of the partnership assets is concerned, he has been awarded interest at 6 per cent. on the amount due to him from the 31st December, 1921 till delivery.

The plaintiff now appeals and objects to the decree on the ground that he is entitled not only to interest on his share but also in the alternative to a share of the profits which have been obtained by the use of his share. It is not disputed that since 1921 defendants 1 to 3 have continued to carry on the same business as was carried on before that date by them in conjunction with the plaintiff. The plaintiff's claim to share in the profits earned since he left the business is based on section 88 of the Trusts Act. Illustration (*f*) to that section runs as follows:—

"*A* and *B* are partners. *A* dies. *B* instead of winding up the affairs of the partnership, retains all the assets in the business. *B* must account to *A's* legal representative for the profits arising from *A's* share of the capital."

In a case of this Court reported in *Hajee Summar Sait* v. *Mahomed Hussman Sait*[1] a Divisional Bench held that this illustration went beyond the law in India, the main ground of this decision being that the surviving partners did not stand in a fiduciary relation to the retiring partner or his representative. No reference was made in that case to the decision of the Privy Council in a similar case (*Bhagwandas* v. *Rivett-Carnac*[2]) where we find at page 550:

"It seems to their Lordships that the proper order will be to direct an account to be taken of the partnership dealings and transactions, to inquire what was due to the estate of Hemabai in respect of her share at the time of her death, and how the amount due to her estate has been dealt with, and, if it appears that such amount, or any part thereof, has been employed in the business continued by the surviving partners, to direct the accounts of such business to be taken."

1. (1916) 4 L.W. 521.

2. (1898) L.R. 26 I.A. 32 at 37: I.L.R. 23 B. 544 (P.C.).

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This principle has been subsequently repeated in *Haji Hedayetulla* v. *Mahomed Kamil*[3] where it was held that the representatives of the deceased partner were entitled to the same share as the partners would have taken if the partnership had not been dissolved. The same principle is laid down by statute in English Law, *i.e.*, section 42 of the Partnership Act, 1890, and the question has been considered at great length in *Hugh Stevenson & Sons* v. *Aktiengesellschaft*[4] where the contention that the surviving partners do not stand in a fiduciary relation to a retiring partner or to the representatives of a deceased partner is very emphatically negatived and it was held that section 42 of the Partnership Act, 1890, only gave effect to what was the law then existing. This proposition is discussed in Lindley on Partnership, 9th edition, page 707 *et seq.*

> "On the other hand, to limit the compensation to interest (at the accustomed rate) would frequently enable the wrongdoer to profit by his own wrong, and be an inadequate compensation to the owner. It may, therefore, be necessary to give the owner the profits made by the trader by the use of the property in question, after making the trader all just allowances, including a fair remuneration for his trouble To do so may moreover be justified upon the ground that the profits are accretions to the property which has yielded them and ought to belong to the owner of such property, in accordance with the maxim, *accessorium sequitur suum principale*"

It seems therefore to be very clearly established that when a partner retires from a business which is not wound up but is continued by the surviving partners, he is entitled to a share in the profits which have been obtained by the use of his share in the partnership assets. It is not necessary that the whole of the partnership assets should be used in making the subsequent profit, for if any portion of the assets are so used, the retiring partner, who has a share in every portion of the partnership assets, is entitled to a similar share in the profits, if any portion of those assets has been utilised in making the profits. This is laid down by Romer, J., in a very recent case in *Manley* v. *Sartori*.[5] It is often difficult to ascertain the exact share in the profits which should be awarded as Lord Lindley pointed out (at p. 710), and it may therefore be more proper in such cases to award interest on the share of the assets at the date of the dissolution.

That the law is as set out above is not seriously disputed by Mr. Varadachariar for the respondents, but he contends that

3. (1923) 19 L.W. 425 (P.C). 4. (1918) A.C. 239.
5. (1927) 1 Ch. 157.

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the plaintiff has not claimed such a remedy in his plaint and he must be deemed to have elected to seek his remedy in the shape of interest and to have given up his claim to a share in subsequent profits. Naturally the plaint does not specifically claim this share in subsequent profits, for, at the time it was drafted, the plaintiff could not know that the other partners would not at once make over to him his proper share, nor that they would continue the business, but there is nothing in the plaint which goes to show that the plaintiff relinquished any right to subsequent profits which he has in law. In fact at the trial when it was clear that the business had continued for some considerable period after the dissolution, his claim to these profits was strongly asserted but negatived by the Subordinate Judge for the reasons given in paragraphs 34 and 35 of his judgment in which he refers to the weight of authorities negativing such a right.

Inasmuch as the suit partnership was a family business, the matter might be deemed to be somewhat more complicated as it is difficult to ascertain what are the partnership assets as distinguished from the joint family properties, but this point is not of very much weight, for, even under S. 95 of the Trusts Act, the same principle is prescribed with reference to joint owners of property and it has always been held in the case of a joint Hindu family that the manager, after the date of division in status, is under an obligation to account for his management of the whole of the family property, he being co-owner in possession of the property of the separated member of the family. Cf. *Watson & Co.* v. *Ramchund Dutt*[6] and *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar.*[7]

A long argument has been addressed to us relating to the conduct of the respective parties but that is really immaterial, except possibly in the awarding of costs, when we have to determine what are their legal rights and it is not seriously disputed now that the plaintiff has a right in law to claim a share in the subsequent profits of the partnership.

The enquiry that will now be made is an examination of the accounts of the business not only up to the 31st December, 1921, but up to the date of this decree. In taking this account, the defendants will be entitled to be credited with a sum sufficient to recompense them for the skill and labour employed in the con-

6. (1890) L.R. 17 I.A. 110: I.L.R. 18 C. 10 (P.C.).
7. (1927) I.L.R. 50 M. 866: 53 M.L.J. 189.

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duct of the business since 1921 and it will also be open to them to prove that any portion of the profits was obtained not by reason of the use of the partnership assets but in some other manner. The term "partnership assets" must be deemed to include the good-will of the business, for the plaintiff is entitled to a share in the good-will as well as to a share in the actual assets of the business.

The contention of Mr. Varadachariar that plaintiff has elected to receive interest rather than share in future profits must be negatived, for a person cannot elect between two things unless he is in a position to know what those two things are and can make a voluntary choice between them. In the present case, the plaintiff is not therefore bound to make his election until the share of the profits that would fall to him has been ascertained. If the subsequent business ended in a loss, the plaintiff would be entitled to claim the assets due to him at dissolution together with subsequent interest and therefore his final election must be postponed until the accounts have been taken.

The next point on which the appeal has been argued relates to the family moveables. The plaintiff claimed certain items in his plaint, some of which were admitted and others denied. The Subordinate Judge has held that the plaintiff has not proved the existence of those that he claims and therefore he was only entitled to a share in those admitted by the defendants. It appears that the plaintiff has tried to secure the appointment of a receiver in this suit, and that when that was disallowed, he applied for a commissioner to take an inventory of the moveables, which was also disallowed. When the plaintiff was in the witness-box, his pleader made a statement that oral evidence as to moveables would not be adduced and that the plaintiff would rely on what could be shown from the accounts when they were examined to ascertain the partnership assets. This statement was apparently accepted by the Court and consequently no oral evidence was let in. In these circumstances and in view of the fact that the plaintiff had been out of possession of the family moveables, he ought to be allowed an opportunity of proving what moveables existed by reference to the family and partnership accounts and this must be done in the taking of the accounts.

The third point relates to the mesne profits from the immoveable property. A sum of Rs. 1,250 was deposited by the defendants in respect of the first year's profits but this was done in order to avoid the appointment of a receiver and cannot be

treated as an admission that Rs. 1,250 was the actual amount of mesne profits in that year. The actual amount must be ascertained by reference to the accounts and the various payments made by defendants must be set off against that amount and the plaintiff awarded his share accordingly.

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This appeal must, therefore, be allowed and the Lower Court's decree modified in accordance with the above judgment. The third defendant has not opposed this appeal and therefore defendants 1 and 2 will pay plaintiff's costs of the appeal. The Sub-Judge will take steps to secure the accounts from defendants as soon as possible and then proceed to appoint a commissioner for their examination.

Thiruvenkatachariar, J.

Thiruvenkatachariar, J.—This appeal arises out of a suit brought by the appellant for the partition of family properties belonging to him and defendants 1 to 3. The 1st defendant is the plaintiff's father and defendants 2 and 3 are his (plaintiff's) brothers. It has been found by the Lower Court that the family continued undivided in status till the 31st December, 1921, on which date the plaintiff became divided in status and in estate from the other members of the family. This finding is not questioned before us. The family besides owning considerable immoveable and moveable properties was also carrying on trade from a very long time and on the date when the plaintiff separated from the family and became divided in status the family was carrying on a business in salt at Tuticorin in the name of R. M. Muthuswami Aiyar & Sons, and among the properties sought to be divided are the assets of that family trade. The plaintiff in his plaint says that he is no longer willing to carry on that business as a family concern and that it is therefore just and necessary to dissolve the firm as from the date of the plaint and ascertain the net profits available for distribution between him and the defendants 1 to 3. The plaint was filed on the 9th February, 1922. The defendants 1 to 3 in their written statement pleaded that

"plaintiff severed his connection from the business in Arpisi, 1096 and from the family on the 1st Margali, 1096. Since then he became a divided member. Plaintiff is not therefore entitled to the benefits of nor is he liable to the obligations under any contracts entered into since he left the business."

With reference to this plea the fourth issue in the case was framed in the following terms: "Whether plaintiff has no interest in the firm of R. M. Muthuswami Aiyar & Sons after he became divided in status from defendants 1 to 3," that is, after the 31st

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December, 1921. It is admitted that even after the plaintiff had separated from the family and became divided in status the other members of the family continued to carry on the business in salt and it was still being carried on when the suit came on for trial about four years after its institution.

At the trial the plaintiff claimed that though the family partnership stood dissolved, so far as he is concerned, on the 31st December, 1921 and he is entitled to his share of the assets of the business as it stood on that date, he is also entitled to a share of the profits earned by the business continued by defendants 1 to 3 subsequent to his separation therefrom.

Defendants 1 to 3 denied the plaintiff's claim to a share in these profits and contended that he can be awarded only interest on the amount found due to him on the date his connection with the firm ceased. This was one of the main questions raised at the trial. On that question the Subordinate Judge finds that plaintiff became divided in status and in estate on the 31st December, 1921, and that he had no interest in the firm of R.M.M. & Sons continued by defendants 1 to 3 after the said date; and that he would be entitled to the money value of his share in the said firm as it stood on the said date together with interest thereon at 6 per cent. per annum.

The main question argued before us in this appeal is that the plaintiff's claim to a share in the profits of the business carried on by defendants 1 to 3 subsequent to the 31st December, 1921 should have been allowed. It is contended on behalf of the appellant that when a partner retires and the business of the firm is thereafter carried on by the other members of the firm with its capital or assets without any final settlement of accounts as between them and the outgoing partner, then he, in the absence of any agreement to the contrary, is entitled at his option either to claim a share of the profits made with the use of his share of the partnership assets since the dissolution of the firm by his retirement or to interest on the amount of his share in the partnership as it stood on the date of its dissolution. That is the rule enacted in section 42 of the English Partnership Act. There is no corresponding provision in the Indian Contract Act, but it is contended that section 42 of the English Act merely enacted what had prior to that Act been held to be the law in a long series of decisions of the Courts of Equity and that the same rule has also been held to be applicable to partnerships in this country, as a rule of justice, equity and

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good conscience. The appellant's advocate relies also on sections 88, 90 and 95 of the Indian Trusts Act in support of the same contention. Section 88 says (to quote only the relevant portion):

"Where a trustee, executor, partner, agent, director of a Company, legal adviser or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage . . . he must hold for the benefit of such other person the advantage so gained."

Illustration (*f*) to that section is particularly relied on and it runs as follows:

"*A* and *B* are partners. *A* dies. *B* instead of winding up the affairs of the partnership, retains all the assets in the business *B* must account to *A's* legal representative for the profits arising from *A's* share of the capital."

Section 90 enacts:

"Where a co-owner by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, he must hold, for the benefit of all persons so interested, the advantage so gained but subject to re-payment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against the liabilities properly contracted in gaining such advantage."

Lastly section 95 says:

"The person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Provided that where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment."

It is argued that these provisions recognise the same equity which was recognised by the earlier English decisions which have since been embodied in section 42 of the English Partnership Act and that upon the facts of the present case the plaintiff is entitled to claim a share of the profits by reason of defendants 1 to 3 having used his share of the assets in carrying on the business subsequent to 31st December, 1921. In support of this contention the decisions of the Privy Council in *Bhagwandas* v. *Rivett-Carnac*[2] and *Haji Hedayetulla* v. *Mahomed Kamil*[3] are relied on. In both those cases the partnership was dissolved by the death of one of the partners and thereafter the business was continued by the surviving partner or partners with the assets of the dissolved firm and their Lordships held that the

2. (1898) L.R. 26 I.A. 32: I.L.R. 23 B. 544 (P.C.).
3. (1923) 19 L.W. 425 (P.C.).

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legal representatives of the deceased partner were entitled not only to an account to be taken of the partnership dealings and transactions to ascertain what was due to the estate of the deceased partner in respect of his share at the time of his death, but also to an enquiry as to how the amount due to the deceased partner's estate has been dealt with by the surviving partners subsequently and if it appears that such amount or any part thereof has been employed in the business continued by the surviving partners, to direct an account of such a business to be taken. In *Bhagwandas* v. *Rivett-Carnac*[2] their Lordships also recognise the right of the legal representative of the deceased partner to elect either for the profits so ascertained or for interest and he may exercise that option after the accounts for the subsequent period are taken and the result ascertained. In that case the legal representative of the deceased partner was a minor on whose behalf the suit was filed by the Administrator-General to whom the letters of administration were granted for the estate of the deceased.

In *Haji Hedayetulla* v. *Mahomed Kamil*,[3] which was an appeal from *Mahomed Kamel* v. *Haji Hedayetulla*,[8] a business was carried on by two persons in partnership. On the death of one of them named Fazil the partnership became dissolved but the surviving partner continued the business with the assets of the firm. In a suit brought against him by the legal representatives of the deceased partner for accounts being taken the Calcutta High Court held that he was liable to give to the representatives of Fazil a share of the profits of the business which may have accrued subsequent to his death up to the date when the final decree is made, all just allowance including fair remuneration to be allowed in favour of the defendant for managing the business and further ordering that the plaintiffs as representatives of Fazil will be entitled to the same share as he would have taken if the partnership had not been dissolved and the profits will be assessed on the basis of what may be found due to him on the date of his death. This decree was affirmed by the Privy Council. In this case the only question raised appears to have been whether the accounts should be taken only up to the period of dissolution of the partnership by the death of Fazil or up to the date of final decree. No question appears to have been raised as to whether Fazil's legal representatives

2 (1898) L.R. 26 I.A. 32: I.L.R. 23 B. 544 (P.C).
3. (1925) 19 L.W. 425 (P.C).
8. (1921) I.L.R. 48 C. 906.

could claim only interest on his share of the assets as it stood on the date of the dissolution. The only other decision of the Privy Council which has been referred to in the arguments is the case in *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji.*[9] In this case after the dissolution of a partnership by the retirement of a partner the other partners continued the business of the firm using its assets for that purpose. In a suit brought against them by the legal representatives of the retired partner (who subsequently died) they were ordered by the Trial Judge, Fletcher, J., to account for such assets with interest thereon from the date of dissolution. That decree was on appeal affirmed by Sir Lawrence Jenkins, C.J. and Woodroffe, J., who observed that Fletcher, J., had a discretion to allow interest and that having regard to the conduct of the appellant and the circumstances under which their liability arose that discretion ought not to be interfered with. In the appeal to the Privy Council preferred against that decree the Counsel for the appellants contended that in such a case interest should not be awarded unless fraud on the part of the partner who continued the business was found. The respondent's Counsel in meeting that objection contended that the right to interest depended on the law of the Equity Courts that where after a partnership has been dissolved a partner continuing the business takes the assets of the partnership and trades with them, the other partners have a right to elect whether they will have a share of the profits made or interest on the amounts taken. He further contended that the discretion of the Court was properly exercised by decreeing interest in that case. With reference to these contentions Lord Sumner in delivering the judgment of their Lordships dismissing the appeal observed as follows:

> "It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud."

It seems to me upon a careful consideration of the report of this case that the plaintiffs made no alternative claim therein either for a share of the profits or for interest as the Court may think fit to allow; but that they elected to have interest on the amount due to the retired partner and that the only question decided was that they were entitled to interest as claimed. In this view Mr. Justice Seshagiri Aiyar's observation in *Hajee Summar Sait*

9. (1915) L.R. 42 I.A. 91: I.L.R. 42 C. 914: 29 M.L.J. 70 (P.C.).

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v. *Mahomed Husshum Sait*[1] that this case is authority for the proposition that in such cases the Courts have a discretion whether to allow to the retiring partner or to the representatives of the deceased partner a share of the profits or only interest seems to be not warranted. If the decision in *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*[2] is to be so understood it would be in conflict with their Lordships' previous decision in *Bhagwandas* v. *Rivett-Carnac*[4] wherein it is clearly recognised that the plaintiff has an option to claim either profits or interest as in section 42 of the English Partnership Act. Neither in *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*[2] in which interest was awarded, nor in *Haji Hedayetulla* v. *Mahomed Kamil*[3] where profits were awarded, was the question of the plaintiff's option to claim either of the alternative reliefs considered as it was in *Bhagwandas* v. *Rivett-Carnac*[4] and the only legitimate inference to be drawn therefrom is that in both those cases the plaintiffs definitely elected for one of those reliefs in the plaint and the Court therefore had only to consider the right of the plaintiff to that relief. The further observation made by Seshagiri Aiyar, J., in the same case that illustration (*f*) to section 88 goes further than the operative portion of the section seems to me to be also not well founded. The section says (to quote only so much of it as is relevant) that:

> "Where a partner or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

It may be that there may be no fiduciary relationship between the surviving partner and the legal representatives of the deceased partner (which is a question on which opinion is divided). But the partner, in continuing the trade with the assets of the dissolved partnership, certainly avails himself of the opportunity he had as a partner in possession of the assets and that is sufficient to bring him within the operative part of the section. The words in the section "or other person bound in a fiduciary character to protect the interests of any other person" have to be construed not as referring to a trustee, executor, partner, agent, director of a company or legal adviser who are expressly mentioned in the section as holding a fiduciary character

1. (1916) 4 L.W. 521.
2 (1898) L.R. 26 I.A. 32: I.L.R. 23 B. 544 (P.C)
3. (1923) 19 L W. 425 (P.C).
4. (1915) L.R. 42 I.A. 91. I.L.R. 42 C 914: 29 M.L.J. 70 (P.C)

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but to bring in any other person not coming within those categories who is bound to protect the interests of any other person. Under illustration (*f*), as in section 48 of the English Partnership Act, the liability of the surviving partner who continues the business is based on his using the assets of the old firm for that purpose. Partners being co-owners of all the partnership assets including its goodwill, the partner who continues the business after the death or retirement of the co-partner with the assets of the firm will, under sections 90 and 95 of the Trusts Act, be accountable to the retired partner or to the legal representatives of the deceased partner for the profits made by him by such user of the common property, subject to a fair allowance being made to him for his labour and skill and to the other provisions in his favour contained in those sections. Indeed having regard to the ground on which liability of the partner continuing the business is based, the right to claim profits would seem to be rather the primary right, and the right to claim interest the alternative right, the option to choose between them being given to the partner or his representative whose property has been so used without his authority.

The Subordinate Judge in support of his conclusion that the plaintiff is not entitled to claim a share in the profits of the business which was continued by defendants 1 to 3 after the date of the dissolution relies on *Hajee Summar Sait* v. *Mahomed Husshum Sait*[1] and also on section 241 of the Contract Act which according to him supports the view that whatever is due to an outgoing partner or to the representative of the deceased partner is a debt and nothing else than an ordinary debt accruing on the date of the dissolution. Section 241 has to be read with section 240 and when so read, it has no application whatever to the present case. The effect of section 241 is merely to provide that a retiring partner, by leaving his property to be used in the business after his retirement, does not become a partner as regards the business which is continued after his retirement, but is merely in the position of a lender to the business within the meaning of section 240. The question as to what right he can claim, by reason of such user of the property when there has been no agreement regarding it, is a question which is not touched by section 241. Upon the authorities already referred to there can be hardly any doubt that the retiring partner can, in the absence of any agreement to the contrary, claim at

1. (1916) 4 L.W. 521.

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his option either a share of the profits of the business which was continued with his assets or interest on the amount of his share of the partnership assets.

This proposition is hardly disputed by the learned advocate for defendants 1 to 3, but he contends firstly that they made no use of plaintiff's share of the assets of the business in continuing the business after the date of the dissolution and that therefore the foundation of plaintiff's claim to share in the profits fails, and secondly that the plaintiff by his conduct prior to the suit and in his plaint has elected to forego any share in the profits of the business. It is argued that if defendants 1 to 3 did not actually use more than their three-fourth share of the assets of the business in continuing the same after dissolution, they cannot be held liable to the plaintiff for the profits they may have made after dissolution. This argument ignores the rights of the plaintiff with regard to the common assets of the business. Until those assets are divided and his share given to him, he is a tenant-in-common with them in respect of the whole assets and even though only a portion of the assets may be used in the new business the assets so used is the common property of all the co-sharers including the plaintiff and he will be entitled to claim a share of the profits by such user. This contention is therefore untenable. I may, however, add that it is not open to the plaintiff in making the election to claim a share of the profits with regard to a portion of the assets and claim interest with regard to the rest. He must choose between the alternative reliefs with regard to the entire assets as a whole. In the present case the continuance of the family business by defendants 1 to 3 cannot *per se* be regarded as wrongful merely because one member of the family who was entitled to a fourth share in it chooses to break off suddenly. To discontinue a long-standing business suddenly in which a large amount of capital has been embarked may result in heavy loss to the other members of the family and there can be no objection to their continuing the business on their behalf and at their risk, and their doing so will in no way prejudice the plaintiff's rights to have accounts taken of the dissolved partnership as it stood at the date of the dissolution. He has a further right to claim at his option either his share of the profits which were earned by the employment of his share of the assets in the new business or interest on the amount due to him at the date of the dissolution. If he elects to claim profits it will have to be ascertained what profits are attributable to his share of the assets employed by defendants 1 to 3 in continuing the business and what allow-

ances should be made in their favour as provided in section 95 of the Trusts Act.

As regards the further contention that the plaintiff has in fact elected against claiming a share of the profits, our attention was drawn to the following statement in paragraph 13 of the plaint:

"Under the circumstances, the plaintiff is not willing to continue the business any longer as a family concern and he has reasonable grounds to fear that want of mutual confidence cannot but lead to loss It is therefore just and necessary to dissolve this new firm and ascertain the net assets available for distribution between the plaintiff and defendants 1 to 3";

and also to prayer (*e*) which runs as follows:

"That the family trade as now carried on be dissolved as from this date That accounts of the profits accrued up to date be taken and direct defendants 1 to 3 to pay one-fourth share of the ascertained profits."

This suit was filed on the 9th February, 1922, within a comparatively short time after the date of the dissolution and when the plaintiff would not know whether defendants 1 to 3 will immediately wind up the business or continue the same on their behalf. The contingency for making an election as between the alternative reliefs had not then happened. It is argued that the plaintiff's statement in paragraph 13 that continuing the business in the circumstances cannot but lead to loss shows a definite election on his part not to have any concern in the profits or loss of the business after his retirement therefrom. But it seems to me that all that the plaintiff says therein is that he is not willing to continue the business any longer as a family concern, as owing to want of confidence between himself and the other members of the family co-operation between them is not possible and the business conducted without it must result in loss. The prayer (*e*) also does not take the matter any further. At the trial of the case, which took place about four years after the date of the plaint, during which time the business had been conducted by defendants 1 to 3, the plaintiff elected to claim a share of the profits. That is quite clear from the judgment of the Lower Court which refers to the rival contentions put forward by both the parties on this question. In the appeal before us the plaintiff has definitely elected to ask for a share of the profits; grounds Nos. 2 to 7 of the Memorandum of Appeal relate to this question but it will be sufficient to refer to ground No. 5 which runs as follows:

"In any event, the Court below ought to have held that the plaintiff has a right to elect whether he will take a share of the profits made, or have interest on the property retained in the business by the defendants and that the plaintiff has elected to ask for a share of the profits."

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The position taken here is quite clear and unambiguous. That a person who has an option to elect between two alternative claims or reliefs cannot be required to elect without a clear knowledge of the respective claims, between which he has to elect, is clear law. (*See* Halsbury's Laws of England, Vol. 13, page 124, paragraph 141). The learned author therein says:

"Hence he is entitled to be allowed time to consider as to his election and if necessary election will be postponed till the accounts of the property concerned have been taken. Election made before the party has had an opportunity of ascertaining his rights and the value of them or under a mistake as to matters on which those rights depend will not be binding, though if election has once been deliberately made, the persons claiming under the electing party are bound thereby without distinct evidence being given that he was aware of his rights."

The accounts of the business carried on by defendants 1 to 3 have not yet been taken and it was quite open to the plaintiff to put off his election until the result of the taking of the accounts is known. He could do so under the authority of *Bhagwandas* v. *Rivett-Carnac*,[2] but nevertheless the plaintiff has in his Memorandum of Appeal chosen to elect to claim a share of the profits, in the belief, no doubt, upon such knowledge as he may possess, that it will be much more advantageous to him than to claim interest on the amount due to him on the date of the dissolution. It seems to me that the present case falls within the last proposition stated in the paragraph cited above from Halsbury's Laws of England. In support of that proposition the learned author cites the case in *Dewar* v. *Maitland*.[10] In that case the law on this point is stated as follows:

"There is no doubt that before the heir was put to election he is entitled to know everything which concerns the situation and value of the property in respect of which he may be required to make the election. But there is no authority for the proposition that where the heir has chosen deliberately to confirm a devise of land, which, without his confirmation, would be invalid, there must be distinct evidence of his knowledge of his rights. Although a Court compels persons to elect yet election itself is a voluntary act."

I have referred to this point because Mr. Krishnaswami Aiyar in his argument in reply contended that he has not yet made any definite election and that even if he has made it is not binding upon him and that if the taking of the accounts of the new business is less favourable to him than claiming interest he still can elect to claim interest. I should be very loath to allow the plaintiff to go back upon an election which I think he has deliberately made but for the special circumstances of this

2. (1898) L.R. 26 I.A. 32· I.L.R. 23 B. 544 (P.C.).
10. (1866) L.R. 2 Eq. 834.

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case. The plaintiff applied for the appointment of a Receiver and for the production of the accounts of the new business and both those reliefs have on the objection of defendants 1 to 3 been withheld from him so far. He had therefore to form an opinion on that question on other and much less satisfactory materials, and perhaps also he was not advised that he can put off his election till his accounts were looked into. Having regard to the conduct of the defendants in this case in withholding from the plaintiff the information which he was entitled to, I am not prepared to hold the plaintiff finally bound by the election he has already made. I am therefore of opinion that the contention of the appellant on this question must be allowed in its entirety. Two other questions were argued before us and on these questions I agree with the observations of my learned brother whose judgment I have had the advantage of perusing and having nothing to add thereto, I agree also in the order proposed by him.

N.S. *Appeal allowed and decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE PAKENHAM WALSH.

Rathinasabapathi Odayar declared major, *vide* order, dated 7th August, 1928, on C.M.P. No. 1022 of 1928 .. *Appellants** (*Defts.* 1 *and* 3)

v.

Gopala Odayar and others .. *Respondents* (*Plff. and Defts.* 4 *and* 5).

Rathinasabapathi Odayar v. Gopala Odayar.

Hindu Law—Illegitimate son of Sudra—Joint ancestral property—Share of deceased father in—Right to, as against surviving members of joint family—Maintenance—Right to—Amount of—Data for fixing—Arrears of maintenance—Right to—Conditions—Demand and refusal—Necessity—Civil Procedure Code—S. 11; O. 2, R. 2—Bar under—Illegitimate son—Mother of—Maintenance of son and of herself—Suit for, during son's minority—Suit really for maintenance till son attained majority—Alternative prayer for maintenance for life of son—Decree in suit giving son maintenance till he attained majority—Effect—Suit subsequent by him for maintenance for his life—Maintainability—Pleadings in the Moffusil—Liberal construction of—Necessity

The illegitimate son of a Sudra does not acquire by birth an interest in the property of his putative father's father and therefore cannot get the father's share if the putative father dies undivided from his brother or brother's sons or other collaterals.

The illegitimate son of a Sudra is entitled to maintenance.

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*Appeal No. 203 of 1925. 1st November, 1928.

Rathinasabapathi Odayar v. Gopala Odayar.

Exhaustive review of the texts and decisions relating to the position and rights of illegitimate sons.

The view that the illegitimate son of a Sudra is entitled only to a compassionate rate of maintenance is not correct. In fixing the amount of maintenance to be awarded to an illegitimate son, the Court must have regard to the circumstance that he was the illegitimate son of a wealthy man and therefore accustomed to a certain mode of life and to the income of the family.

It is not necessary that there should be a distinct demand in cases of maintenance in order to sustain a claim for arrears. Where the defendants neither paid nor offered to pay plaintiff maintenance at the rate fixed by the Court, but on the other hand denied his claim to maintenance altogether, *held*, that the plaintiff could be granted arrears at the rate fixed by the Court

During the minority of the plaintiff, the illegitimate son of a deceased Sudra, his mother instituted a suit claiming maintenance on behalf of herself and of the plaintiff from the surviving members of the joint family of the deceased. The plaint read as a whole showed that the claim for maintenance was laid on the basis that the plaintiff was entitled to a share in the family properties and that the relief really sought for in that suit on behalf of the plaintiff was maintenance until he attained majority and got his share in the family properties The prayer portion of the plaint, however, contained a claim in the alternative for maintenance for the natural life of the plaintiff. But neither the defendants nor the Court understood the plaint as presenting a claim for maintenance for the natural life of the plaintiff. The decree passed in the suit gave plaintiff maintenance only until he attained majority, and no reasons were assigned in the judgment for thus limiting the relief awarded to the plaintiff.

Held, that the decision in that suit was not a bar, either under section 11 or Order 2, Rule 2 of Civil Procedure Code, to a suit for maintenance brought by the plaintiff after attaining majority.

Per Pakenham Walsh, J.—The alternative prayer for maintenance for the life of the plaintiff in the prior suit was intended to *restrict* the first and primary prayer for maintenance until he attained majority and not to *extend* it.

Appeal against the decree of the District Court of West Tanjore at Tanjore in O.S. No. 6 of 1925.

S. Varadachariar and *K. Narasimha Aiyangar* for appellants.

T. R. Venkatarama Sastriar, K. Bhashyam Aiyangar and *K. Raghavachari* for 1st respondent.

2nd and 3rd respondents unrepresented.

Memo. of Cross-Objections.

T. R. Venkatarama Sastriar.—My contention is that an illegitimate son is entitled to a share even though the putative father died undivided from his co-parceners. The question whether an illegitimate son can claim to inherit the properties of his putative father's collaterals is a different matter. The cases against his right to a share proceed on a misinterpretation of the texts and require reconsideration in view of the observations in *Meenakshi* v. *Muniandi Panikkan*,[1] *Soundararajan* v. *Aruna-*

1. (1914) I.L.R. 38 M. 1144 at 1147: 27 M.L.J. 353.

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chalam Chetty,[2] *Subramania Aiyar* v. *Rathnavelu Chetty*[3] and *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb*.[4] (Reference was made to Vyavahara Mayukha, S. 8; Sarvagna Narayana's commentary; Balambhatti's commentary; Sarasvati Vilasa, pl. 395 to 397; Medhatithi as translated in *Rajani Nath Das* v. *Nitai Chandra Dey*.[5]) Chap. I, Mitakshara, deals with Apratibandha Daya—unobstructed heritage—and S. 12 dealing with the rights of illegitimate son is part of that Chapter and therefore covers a claim to share in ancestral property irrespective of whether the father died divided or undivided. It is only in Chap. II that the Mitakshara pre-supposes the death of the father as a divided householder. Under Ss. 1 to 5 of Chap. I, the father's share, whether separate or joint, is taken by all the sons—primary and secondary. Chap. I, s. 9, pl. 33 confers the right to inherit the father's estate on all sons without exception and in pl. 41 son by a Sudra wife, though legitimate, is given a tenth share and the remainder goes to the co-parceners. Then comes section 12, which makes a special provision for partition of Sudra's wealth by the illegitimate sons of a Sudra. Sarasvati Vilasa, pl. 398, 399, Vyavahara Mayukha, S. 8 clearly show that only Chap. II, Mitakshara, deals with property of a separated member. As section 5, Chap. I deals with some subsidiary sons admittedly, by the rule of Exigesis, all subsidiary sons, including the illegitimate son, come under section 5, and, therefore; the argument that the text regarding illegitimate son comes only later in section 12 will not hold good. Illegitimate son is one of the substitutionary sons coming under the principle of section 11. It may be argued that section 11 does not cover the case of a Dasiputra dealt with only later. But the answer to that is that having dealt with substitutionary sons of Dwijas he later provides for Dasiputra.

Manu also is in favour of giving the illegitimate son a share as against the collaterals. Chap. IX, ver. 140 onwards deal with different kinds of sons and ver. 180 treats an illegitimate son as a substitutionary son and ver. 184 gives him also a right to inherit on failure of the better. Verses 158 and 184 show that the latter six sons of Manu cannot inherit a collateral's property but can inherit the father's property. Verse 185 corresponds to the topic of Chap. II, Mitakshara. This shows that according to

2. (1915) I.L.R. 39 M. 136: 29 M.L.J. 793 (F.B.).
3. (1917) I.L.R. 41 M 44: 33 M.L.J. 224 (F.B.).
4. (1925) I.L.R. 49 M. 116: 49 M.L.J. 568
5. (1920) I.L.R. 48 C. 643 at 688 (F.B.).

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Manu, Dasiputra takes as a substitutionary son and excludes the brother, etc., and Mitakshara's arrangement based on this does not negative a Dasiputra's rights to take his father's property in preference to the father's brother, etc. Sections 11 and 12 of Mitakshara, Chap. I must therefore be taken as bringing all classes of sons, including illegitimate sons in S. 12 under the category of sons. Viramitrodaya deals with the Dasiputra even before adopted son—Setlur, p. 72, section 4, pl. 29. The principle of *jus representationis* will apply as much to the undivided share of the father as to his divided share. It is said that as widow and illegitimate son are placed on an equal footing by the text, illegitimate son like the widow cannot prevent survivorship. But the text recognises a right in the illegitimate son to demand a partition from the legitimate son and it is now established that there is co-parcenary between the illegitimate and the legitimate son. Compare *Sadu* v. *Baiza*[6]; *J. B. Hurrochundra Mahapatra* v. *N. Man Singh*.[7] Dayabhaga, IX, 29 and 30 give to the illegitimate son a half share in any event and a full share with the consent of the father.

Again absence of a right to demand partition as against the father is not destructive of right by birth. Compare Ch. I, S 5, Mitakshara, where son is not given a right to interdict alienation or demand partition in the father's self-acquisition, though a right by birth is recognised even in such self-acquisition (*see* also Mayne's arguments in Pittapuram case). Vishnu, Ch. XVIII, sections 32, 33 give to the illegitimate son a half share if he is the only son. Siromani's (Bhattachari first edition) footnote to page 408 (Index) and West and Majid Hindu Law, pp. 77, 78 support this theory. Strange's Hindu Law, Vol. I, p. 132 gives the same right as that of legitimate son except as to quantum of share. In *Krishnayyan* v. *Muttusami*[8] there is no reasoning; the theory of the necessity of legal marriage being necessary is unsustainable, as among Sudras there is no difference between marriage and concubinage. Compare *Meenakshi* v. *Muniandi Panikkan*[1] and *Soundararajan* v. *Arunachalam Chetty*.[2] As to *Ranoji* v. *Kandoji*[9] the theory there that illegitimate son's rights were gradually enhanced is wrong. Compare Vishnu gives half share and Mitakshara only one-tenth to Dwija's illegitimate

1. (1914) I.L.R. 38 M 1144 at 1149: 27 M.L.J. 353.
2. (1915) I.L.R. 39 M. 136 at 152: 29 M.L.J. 793 (F.B.).
6 (1878) I.L.R. 4 B 37 (FB).
7. (1890) L.R. 17 I.A. 128: I.L.R. 18 C 151 (P.C)
8. (1883) I.L.R. 7 M. 407. 9. (1885) I.L.R. 8 M. 557.

son. Also the theory that illegitimate son is not a co-parcener is contrary to Balambhatti. *Parvathi* v. *Thirumalai*[10] proceeds on the assumption that Ch. I, S. 12 applies only to separate or divided property of father. Muthuswami Aiyar, J.'s view that kinship of *aurasa* extends to collaterals while that of illegitimate son to father and his branch alone is doubted in later cases. *Thangam Pillai* v. *Suppa Pillai.*[11] Suit for partition lies between legitimate and illegitimate sons. *Karuppan Chetti* v. *Bulokam Chetti*[12] says "there is no foundation for the suggestion that section 12 refers only to the self-acquired property of the father."

Rahi v. *Govinda valad Teja*[13] followed in *Sadu* v. *Baiza*[6] recognises the status of an illegitimate son as a son and even the structure of Chaps. I and II.

J. B. Hurrochundra Mahapatra v. *N. Man Singh*[7] affirming *Jogendro Bhuputi* v. *Nittyanund Man Singh*[14] says that illegitimate son can give oblations.

Ramalinga Muppan v. *Pavadai Goundan*[15] gives to the son of a deceased illegitimate son a share by *jus representationis.*

Subramania Aiyar v. *Rathnavelu Chetty*[3] is in my favour and I adopt the reasoning there as my argument. The other cases against me are *Nagarathnammal* v. *Chinnu Sah,*[16] *Samu* v. *Babu Aba,*[17] *Dharma Lakshman* v. *Sakharam Ramji Rao,*[18] *Emperor* v. *Machado,*[19] *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb*[4] and they do not carry the arguments any further.

Gamulal v. *Kashiram*[20] is in my favour. It was held that no succession certificate is necessary to enable an illegitimate son to recover debt of putative fathers. That recognises right by birth.

S. Varadachariar.—The decisions on this point are all against the illegitimate son: *Krishnayyan* v. *Muttusami,*[8] *Ranoji* v. *Kandoji,*[9] *Parvathi* v. *Thirumalai,*[10] *Karuppa Goundan* v. *Kumarasami Goundan,*[21] *Gopalasami Chetti* v. *Arunachalam*

3. (1917) I.L.R 41 M. 44: 33 M.L.J. 224 (F.B.)
4. (1925) I.L.R. 49 M 116: 49 M.L.J. 568
6. (1878) I.L.R. 4 B 37 (F.B.).
7. (1890) L.R. 17 I.A. 128: I.L.R. 18 C. 151 at 153 (P.C)
8 (1883) I.L.R. 7 M 407
9. (1885) I.L.R. 8 M 557.
10. (1887) I.L.R. 10 M 334
11 (1888) I.L.R. 12 M. 401.
12. (1899) I.L.R. 23 M. 16.
13. (1875) I.L.R. 1 B. 104.
14. (1885) I.L.R. 11 C. 702.
15 (1901) I.L.R. 25 M. 519: 11 M.L.J. 399.
16. (1927) 53 M.L.J. 861
17. (1927) I.L.R. 52 B 300
18. (1919) I.L.R. 44 B. 185
19. (1921) I.L.R. 46 B 438.
20. (1922) 68 I.C. 417.
21. (1901) I.L.R. 25 M. 429.

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Chetti,[22] *Ram Saran Garain* v. *Tek Chand Garain*,[23] *Dharma Lakshman* v. *Sakharam Ramji Rao*,[18] *Samu* v. *Babu Aba*,[17] *Visvanathaswamy Naicker* v. *Kamu Ammal*[24] and *Nagarathnammal* v. *Chinnu Sah*[25] and there is no case *contra*. My contention is that even as it is the cases have gone further than the texts in favour of illegitimate son. The main argument on the other side is that S. 12 of Mitakshara, Ch. I should not be restricted to a separated householder because (1) Ch. I deals with an undivided member and only Chap. II begins the case of a separated householder. (2) The cases have erroneously assumed that he originally started with maintenance and that S. 12, Mitakshara is an exception, whereas it is only an application of the general rule in favour of sons. Lastly, Balambhatti is relied on.

Scheme of the Mitakshara.—It is not right to say that Ch. I deals wholly with ancestral property or undivided property. According to Mitakshara, even self-acquired property is 'Apratibanda Daya.' The real division between Chaps. I and II is that the former deals with cases where there are *sons* and the latter with cases where there are no sons. The scheme of Mitakshara should not be unduly relied on as it has only to follow the order of Yajnavalkya's texts, being a commentary on it. Ch. I deals with verses 114—134 and Ch. II with 135—149. Even in Ch. I there are several provisions relating to a divided member as well as to self-acquired property. Compare Ch. I, section 2, pl. 8; section 3, pl. 1 partition after the death of both parents; section 3, pl. 9; section 7 partition when mother is alive but father dead. "Heirs" there is misleading. It must be "sons." S. 7, pl. 7 gives sister a quarter share; section 5, pl. 7 deals with both self-acquired and ancestral; section 3 takes in mother's property also and daughters coming in for a share; section 4 deals with self-acquisitions.

The theory of *jus representationis* and of equal rights of father and son in ancestral property are not found in Manu. As per section 5 of Mitakshara, right of representation exists only in grandfather's property wherein son and father have equal rights and in dividing that property father's choice does not come in. This is an indication that in the case of an illegitimate son who is given a share by the father's choice, there can be no right in grandfather's property or equal right of father and son. *J. B. Hurrochundra Mahapatra* v. *N. Man Singh*[7] far from re-

7. (1890) L.R. 17 I.A. 128 · I.L.R. 18 C. 151 (P.C).
16. (1927) 53 M.L.J. 861. 17 (1927) I.L.R. 52 B. 300.
18 (1929) I.L.R. 44 B 185. 22. (1903) I.L.R. 27 M. 32
23. (1900) I.L.R. 28 C. 194. 24. (1912) 24 M.L.J. 271.

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cognising co-parcenary between illegitimate son and the father expressly negatives it. The recognition of co-parcenary between the illegitimate son and his legitimate brother does not involve this. For once there is a devolution, the persons taking on such devolution may take them jointly. Compare *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*[25] where the test is laid down as the right to demand partition. The theory of survivorship under cases has nothing to do with unobstructed heritage or joint family. Compare *J. B. Hurrochundra Mahapatra* v. *N. Man Singh*,[7] *Chotay Lall* v. *Chunnoo Lall*,[26] *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*,[25] and *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer*.[27]

The Judges in *Karuppai Nachiar* v. *Sankaranarayanan Chetty*[28] refused to extend *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*[25] further. The heading to section 11 of Mitakshara in the translation is misleading. Adopted son there means secondary son. Illegitimate son cannot be brought in as *aurasa* (as Sadasiva Aiyar, J., suggests in *Subramania Aiyar* v. *Rathnavelu Chetty*[3]); the Sanskrit is that "Aurasa" is the son of the "Dharmapatni." The illegitimate son is not one of the 12 sons of Yajnavalkya. In Yajnavalkya, Parasava of Manu is omitted. Even if it be possible to suggest that in Manu the illegitimate son is one of the 12, Yajnavalkya omits the illegitimate son and puts in Putrikaputra thereby retaining the number 12. Logically the scheme of Mitakshara will stop with section 11 and therefore Vignaneswara introduces section 12 as a "special rule regarding division of Sudra's wealth." No argument can be based on the fact of illegitimate son having consanguinity because Manu says some sons are kinsmen and heirs and some are only kinsmen. There are indications in section 12, Mitakshara itself showing that it applies only to a divided member. The illegitimate son takes along with brothers and not solely in default of better sons. Also the 12 sons never share with widow, daughter or daughter's sons. This is what

3. (1917) I.L.R. 41 M 44: 33 M.L.J. 224 (F.B).
7. (1890) L.R. 17 I.A. 128: I.L.R. 18 C 151 (P.C).
25. (1902) L.R. 29 I.A. 156: I.L.R. 25 M 678: 12 M.L.J. 299 (P.C).
26. (1878) L.R. 6 I.A. 15 I.L.R. 4 C. 744 (P.C).
27. (1867) 11 M.I.A. 487.
28. (1903) I.L.R. 27 M. 300: 13 M.L.J. 398 (F.B.).

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the cases mean by saying that he bears no analogy to any sons that have gone before and is a special case.

Balambhatti arguing on the use of the word "son of the wedded wife" in section 12 says that adopted son gets nothing in competition with illegitimate son forgetting that in Yajnavalkya the word is merely in competition with *brothers* and that Mitakshara is only contrasting wife and the concubine. Balambhatti is attributed to a woman and her views are revolutionary. (Compare *Bhagwan* v. *Warubai*,[29] *Tulshi Ram* v. *Behari Lal*[30] and Sarvadhikari, p. 534.) In Manu inheritance begins from section 104. Manu starts with the assumption that during father's life-time, son has no right. It is out of section 163 that the earlier cases have said that illegitimate son had originally only maintenance. Original texts of verses 164 and 179 do not say "by whose choice." The word is "Anugnata." Brihaspati says at the choice of the sovereign. *See* also Subodhini; Kulluka at the choice of the brothers. Compare Anugnata of Manu with (Kamataha) of Yajnavalkya. See *Rajani Nath Das* v. *Nitai Chandra Dey*.[5] Verse 184 seems to give a right to the illegitimate son but Yajnavalkya clearly denies it. The original is कामतः अंशहरः भवेत् (Kamataha Amsaharaha Bhaveth). It is sought to be construed as leaving only the quantum of the share to the father's choice. In a compound word the qualification is to the idea connoted by the whole of it and not by a part. It really means that he becomes a share-taker by the father's choice—the right to share itself depending on that. It has been suggested that the daughter's son who is said to share with the illegitimate son may be an "appointed daughter's son" but this overlooks that दुहितृणाम (Dhuhithrunam) is plural and cannot refer to a single daughter. *Ranoji* v. *Kandoji*[9] refuses to follow West and Buhler because the futwahs do not support it. The commentary in West and Buhler is in my favour though the rule is stated wrongly.

Medathithi does not give any right during father's lifetime and Sarvagna Narayana also does not say quantum but "a share." Siromani, though expressing a different view in the first edition, corrects it in the 2nd edition. At the time of the first edition, he had only the case *Sadu* v. *Baiza*[6] and misread

5. (1920) I.L.R. 48 C. 643 at 692 (F.B.).
6. (1878) I.L.R. 4 B. 37 (F.B.).
9. (1885) I.L.R. 8 M. 557 at 562
29. (1908) I.L.R. 32 B. 308.
30. (1889) I.L.R. 12 A. 369.

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it. The second edition shows that his own view is against the illegitimate son.

Under the Mitakshara the adopted son will no doubt be in not much better position, but his position has since been considerably improved by the influence of the Dattaka Mimamsa and Chandrika. His analogy does not therefore help.

Meenakshi v. *Muniandi Panikkan*[1] and *Soundararajan* v. *Arunachalam Chetty*[2] assume that concubinage and gandharva marriage are same. Under the Smritis, even the gandharva marriage requires certain ceremonies. (See *Brindavana* v. *Radhamani*[31]). Further in the gandharva marriage, there is the agreement to live as *husband and wife* whereas in concubinage there is none such. Sadasiva Aiyar, J.'s referring judgment in *Subramania Aiyar* v. *Rathnavelu Chetty*[3] mainly rests on *Mayana Bai* v. *Uttaram*[32] and *Ramalinga Muppan* v. *Pavadai Goundan*.[15] As for *Mayana Bai* v. *Uttaram*[32] see the concluding words of the judgment. *Ramalinga Muppan* v. *Pavadai Goundan*[15] only lays down that the legitimate son of the illegitimate son is entitled to stand in the shoes of his father and claim a share as against the brother. The same Judges in *Gopalasami Chetti* v. *Arunachalam Chetti*[22] refused to recognise the illegitimate son's right as against undivided collaterals of his father. It would be most dangerous to alter the law as established by a uniform course of decisions on the basis of some novel interpretation of the texts (see *Thakoorain Sahiba* v. *Mohun Lall*[33]).

Bhashyam Aiyangar in reply.—At least to a limited extent the arrangement argument can be relied on, *viz.*, that whenever Vijnaneswara refers to self-acquired property, it may be so but if he does not specifically so refer, then Chap. I refers also to ancestral property. At any rate, S. 12 is consistent with reference to both ancestral and self-acquired. Chap. I mainly refers to joint ancestral property and reference to other kinds of property in discussion is only a digression.

Walsh, J.—Why not section 12 also be a digression?

Bhashyam Aiyangar.—Chapter II, section 1, Mitakshara shows that till then the author was dealing only with shares of sons in property whatever they are. The share of the illegiti-

1. (1914) I.L.R. 38 M. 1144 at 1149 27 M.L.J. 353.
2 (1915) I.L.R. 39 M. 136. 29 M.L.J. 793 (F.B.).
3. (1917) I.L.R. 41 M. 44. 33 M.L.J. 224 (F.B.).
15 (1901) I.L.R. 25 M. 519: 11 M.L.J. 399.
22 (1903) I L.R. 27 M. 32. 31. (1888) I.L.R. 12 M 72.
32 (1864) 2 M.H.C.R. 196. 33 (1867) 11 M.I.A. 386 at 403.

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mate son who as a son could have got in is curtailed by section 12, Chap. I.

The Court delivered the following

JUDGMENTS. *Devadoss, J.*—The plaintiff is the illegitimate son of one Venkataramana Odayar, a Sudra. Defendants 1 and 2 are the sons and the 3rd defendant the widow of Panchapakesa Odayar, the brother of Venkataramana Odayar. Defendants 4 and 5 are Venkataramana Odayar's widows. 2nd defendant has been adopted into a different family. Venkataramana Odayar was at the time of his death a member of a joint family consisting of himself and his brother, Panchapakesa Odayar. The plaintiff has brought this suit for a half share of the family property and in the alternative for suitable maintenance and other reliefs. The Lower Court negativing his claim to partition of the family properties has given a decree for maintenance with some minor reliefs. Defendants 1 and 3 have preferred this appeal and the plaintiff has preferred a memorandum of objections.

As the main question in the appeal is as regards the plaintiff's right to partition of the suit property, we allowed Mr. T. R. Venkatarama Sastri, who appears for the plaintiff, to open the case. His contention is that the illegitimate son of a Sudra is entitled to his putative father's share even if the latter was undivided from his brother or brother's sons at the time of his death. This point is covered by ample authorities in *Krishnayyan* v. *Muttusami*,[1] *Ranoji* v. *Kandoji*,[2] *Parvathi* v. *Thirumalai*,[3] *Karuppa Goundan* v. *Kumarasami Goundan*,[4] *Gopalasami Chetti* v. *Arunachalam Chetti*,[5] *Visvanathaswamy Naicker* v. *Kamu Ammal*[6] and *Nagarathnammal* v. *Chinnu Sah*.[7] In all these cases, it was held that the illegitimate son of a Sudra or Dasiputra was not entitled to a share in the family property, if his putative father at the time of his death was not separated from his brothers or brothers' sons. Mr. Venkatarama Sastri attacks the correctness of these decisions and relies in support of his contention upon some observations of Sadasiva Aiyar, and Sir Kumaraswami Sastri, JJ., in *Subramania Aiyar* v. *Rathnavelu Chetty*[8] and urges that the decisions require reconsideration and asks us to refer the question to a Full Bench. As the question

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1. (1883) I.L.R 7 M 407
2. (1885) I.L.R 8 M. 557.
3. (1887) I.L.R. 10 M. 334.
4. (1901) I.L.R. 25 M 429
5. (1903) I.L.R. 27 M. 32
6. (1912) 24 M.L J. 271
7. (1927) 53 M.L.J. 861
8. (1917) I.L.R 41 M. 44: 33 M.L J 224 (F.B).

raised is of considerable importance and as the observations of the two learned Judges to some extent support the respondent's contention we have allowed both the appellant and the respondents' counsel to argue the point with reference to the original authorities.

The law applicable to the illegitimate son of a Sudra, for the purpose of this case, may be summarised as follows: (1) It is well settled that an illegitimate son of a Sudra or Dasiputra is entitled to an equal share with the legitimate son of the putative father if partition takes place during the lifetime of the father and half the share of the legitimate son if partition takes place after the death of the father. The illegitimate son of a Dwija or one of the regenerated classes is entitled to maintenance only. There are positive texts in the law books as regards this and the Courts following them decided that he is only entitled to maintenance. (2) It is likewise well settled that, if the putative father leaves no legitimate male issue but a widow, daughter or daughter's son, the illegitimate son takes half the father's estate and the widow, daughter or daughter's son takes the other half. (3) It is also well settled that, if the father dies leaving neither wife nor daughter, nor daughter's son, the illegitimate son takes the whole of the father's estate. (4) It is also well settled that the illegitimate son of a Sudra cannot succeed to his father's collaterals but can succeed to his father's legitimate son, if he and the legitimate son lived as members of a co-parcenary. (5) The putative father of an illegitimate son can succeed to him if he leaves neither wife nor lineal descendants.

Mr. Venkatarama Sastri attacks the correctness of the decisions of the Madras High Court in *Krishnayyan* v. *Muttusami*,[1] *Ranoji* v. *Kandoji*,[2] and other cases on the following grounds:—(1) The learned Judges erred in not reading S. 12 of Chap. I of the Mitakshara as relating to unobstructed heritage. (2) The learned Judges made a mistake in thinking that an illegitimate son of a Sudra had originally a right to maintenance only and not the right to a share. (3) Section 12 of Chap. I of Mitakshara relating to the illegitimate son is not an exception to the general rule of inheritance relating to sons but is only a part of it. (4) If the commentary of Balambatta had been brought to the notice of the Judges, the result might have been different. (5) Certain text-writers are strongly of opinion that the illegitimate son of

1. (1883) I.L.R. 7 M 407. 2. (1885) I.L.R. 8 M. 557

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a Sudra is entitled to sue for his share the members of the joint family of which his putative father was a member. Mr. Venkatarama Sastri's arguments may be summarised as follows:—

(1) In the case of Dwijas, Manu and Yajnavalkya Smrithis and other Smrithis recognise 12 classes of sons and in the case of Sudras 13th class is recognised as Dasiputra.

(2) In the Mitakshara the rights of Dasiputra are treated in the portion relating to succession or devolution of Apratibandha Daya, unobstructed property.

(3) The position of Dasiputra is superior to that of a widow or daughter's son whose claims are considered in the portion relating to Sapratibandha Daya, obstructed property.

(4) According to the Mitakshara a Dasiputra is entitled to a share on partition in the life-time of the father and after his death with his legitimate son, whereas the widow, daughter and daughter's son do not get a share when there is a legitimate son.

(5) The illegitimate son being recognised by Smrithis as Dasiputra is entitled to represent his father, as he offers funeral oblations to him and as his father succeeds to him, if he dies leaving neither wife nor descendants.

Manu recognizes twelve classes of sons. Placitum 159 in the Chapter on Inheritance is:

"The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before described, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs."

Placitum 160 is:

"The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice married woman, a son self-given, and a son by a Sudra, are the six kinsmen, but not heirs to collaterals"

In Placitum 163 Manu says:

"The son of his own body is the sole heir to his estate, but, that all evil may be removed, let him allow a maintenance to the rest"

When Manu comes to deal with inheritance he leaves out the case of a son by a Sudra wife. This omission may be a deliberate one or the placitum relating to Sudra's son has been left out by later editors. That Manu made some provision for the share of a son by a Sudra wife can be gathered from the fact that he in placitum 178 speaks of a son begotten through lust.

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The placitum is:

"A son, begotten through lust on a Sudra by a man of the priestly class, is even as a corpse, though alive, and is thence called in law a living corpse."

It would be more appropriate to apply the term Parasava to a concubine's son and not to a son by a Sudra wife. Placitum 179 which refers to an illegitimate son of a Sudra is as follows:

"But a son begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, if permitted by the other sons: thus is the law established."

That placitum 178 could only refer to an illegitimate son is apparent not only from the juxtaposition of the two placita but from the way in which the inheritance of the sons is treated. Jimutavahana in his Dayabhaga understands placitum 178 as referring to an illegitimate son, for the expression "begotten through lust" on a Sudra could not refer to begetting a son on a wife. At page 65 he says,

"hence expression 'begotten through lust' on a Sudra must relate to a child upon an unmarried Sudra."

(In this judgment reference to the Mitakshara and other commentaries are to Setlur's collection of Hindu Law books). In placitum 184 Manu says:

"On failure of the best, and of the next best, among those twelve sons, let the inferior in order take the heritage; but, if there be many of equal rank, let all be sharers of the estate."

Of the twelve the son by a Sudra wife is one. Placitum 185 is:

"Not brothers, nor parents, but sons, if living, or their male issue, are heirs to the deceased, but of him, who leaves no son, nor a wife, nor a daughter, the father shall take the inheritance, and, if he leaves neither father, nor mother, the brothers"

According to Manu the illegitimate son of a Sudra is a son and according to his classification he belongs to the 13th class. His rights to his father's property is recognised in placitum 179 already quoted. In the text there is no word which could be translated as "by the other sons." The word is Anujna which may be interpreted "if permitted." Some translators supply the ellipses with the words "by the father," others, "by the other sons" and some others, "by the brothers." Mr. Varadachari suggests that the permission implied in the text is that of the Sovereign as the law of escheat was very rigorous in those days and the permission of the Sovereign had to be obtained in order to divide the inheritance of a man dying without male issue. From the text and the way in which Yajnavalkya understands it, we may take it that the permission im-

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plied in the text is the permission of the father. Under this text no definite share is given to an illegitimate son. He may have a share if permitted by the father. It was Yajnavalkya that gave a definite share to an illegitimate son. Yajnavalkya (ii. 134-135) says,

"even a son begotten by a Sudra on a female slave, may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share: and one, who has no brothers, may inherit the whole property, in default of daughter's sons."

This text is the foundation of the rights of an illegitimate son to a share in his father's property and is in the portion relating to partition and heritage.

Vijnaneswara begins the portion of the Mitakshara relating to inheritance after referring to what preceded with the words "the partition of heritage is now explained by the Image of Holiness" meaning Yajnavalkya. He says,

"heritage is of two sorts, unobstructed (Apratibandha), or liable to obstruction (Sapratibandha)"

What is Apratibandha and what is Sapratibandha is explained. In section 2 at page 8 he considers at what time, by whom, and how, partition may be made and says,

"when a father wishes to make a partition, he may at his pleasure separate his children (from himself) and either give the eldest the best share, or (if he choose) all may be equal sharers"

This text is explained at considerable length. The next verse is:

"If he make the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions."

This verse shows that the mother took an equal share with the sons, when the division took place in the life-time of the father. The father's power of distribution is explained. Then follows the text:

"A legal distribution, made by the father among sons separated with greater or less share, is pronounced valid"

Section 3 deals with partition after the death of the father. The heading is partition after the death of the father and the mother, the verse is:

"Let sons divide equally both the effects and the debts after their two parents."

According to Yajnavalkya as interpreted in the Mitakshara, the sons could only divide after the death of both the father and the mother. The next verse is:

"The daughters share the residue of their mother's property, after payment of her debts and the issue succeeds in their default."

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From this it is clear that the mother's property was shared by the daughters after payment of her debts and the sons were to pay the debts and to give what remained to the daughters, and if there were no daughters to take it themselves. Section 4 deals with effects not liable to partition. What was acquired by a member of the family without detriment to the father's estate is not liable to partition. Section 5 deals with equal rights of father and son in property ancestral. The text is.

"but among grandsons by different fathers, the allotment of shares is according to the fathers."

The next text is:

"It is well known that the ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody or in chattels (which belonged to him)."

From these texts Vijnaneswara draws the inference that the sons have an equal right with the father in the grandfather's property, and if any of the sons dies before division the grandson gets the son's share. The division is not by *per capita* but by *ster pes*. The Mitakshara reconciles the rules relating to the right of the father to make unequal distribution of the family property among the sons with the rule that the sons acquire an interest equal to that of the father in the grandfather's property by explaining that the rule as to unequal division refers to the self-acquisition of the father and not to ancestral property. The father's right to effect a partition among his sons whether the property is ancestral or self-acquired is undisputed. If the property is ancestral, he is to effect an equal division. As regards property which is not ancestral but which is self-acquired, he may distribute it as he likes, for the sons have no vested interest by birth in the self-acquisition of the father. Section 7 deals with the share of widows. The text is:

"Of heirs dividing after the death of the father, let the mother also take an equal share."

According to Yajnavalkya and Vijnaneswara the mother was to get a share equal to that of the sons on partition. In section 3 the injunction was that the sons should divide after the life-time of the father and the mother but if the sons effect a division in the life-time of their mother they ought to give her an equal share. This right of the mother has been unfortunately whittled down in later times to a right to maintenance. The next verse deals with the share of sisters and says:

"But sisters should be disposed of in marriage giving them as an allotment the fourth part of a brother's own share."

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The Institutes of Vishnu lay down the same rules. Placita 34 and 35 of section 18 are:

"Mothers shall receive shares proportionate to their sons' shares", "And so shall unmarried daughters."

It is to be regretted that these positive rules were ignored in later times and the British Courts which depended for their Hindu Law upon Pandits were misguided by them in regard to the rights of mothers and daughters. Section 11 deals with the several classes of sons. The text is:

"The legitimate son is one procreated on the lawful wedded wife. Equal to him is the son of an appointed daughter. The son of the wife is one begotten on a wife by a sagotra of her husband, or by some other relative. One, secretly produced in the house, is a son of hidden origin. A damsel's child is one born of an unmarried woman. he is considered as son of his maternal grandsire. A child, begotten on a woman whose (first) marriage had not been consummated, or on one who had been deflowered (before marriage), is called the son of a twice-married woman. He whom his father or his mother gives for adoption shall be considered as a son given. A son bought is one who was sold by his father and mother. A son made is one adopted by a man himself. One, who gives himself, is self-given. A child accepted while yet in the womb is one received with a bride He who is taken for adoption having been forsaken by his parents, is a deserted son."

This classification of sons applies to all classes, Brahmana, Kshatriya, Vysia and Sudra. In the case of a Brahman there may be four classes of sons, one born to a Brahman woman, another to a Kshatriya woman, a third to a Vysia woman and the fourth to a Sudra woman. As for the rules as to succession the text is:

"Among these, the next in order is heir and presents funeral oblations on failure of the preceding"

If in the case of a Brahman father, there be no sons by a Brahman woman, his sons by a Kshatriya woman take the inheritance, and in the absence of sons by a Kshatriya woman, his sons by a Vysia woman take the inheritance, and in the absence of sons by a Vysia woman, his sons by a Sudra woman take only one-tenth of the inheritance. The Mitakshara says:

"But the son by a Sudra wife, though legitimate, does not take the whole estate, even on failure of other issue,"

and Manu says:

"But whether the man have sons, or have no sons, no more than a tenth part must be given to the son of the Sudra"

Yajnavalkya for the purpose of inheritance recognizes twelve classes of sons. The first six are termed principal and the next six secondary. According to Manu the first six are heirs and kinsmen and the rest are not heirs but kinsmen. Para 30 at page 33 is, Manu having premised two sets of six sons, declares the first six to be heirs and kinsmen, and the last to be not.

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heirs but kinsmen:

"The true legitimate issue, the son of a wife, a son given, and one made by adoption, a son of concealed origin, and one rejected are the six heirs and kinsmen. The son of an unmarried woman, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a Sudra woman, are six not heirs but kinsmen."

The first six inherit to collaterals but not the rest. All these have a right to inherit to the father and they take in the order given. The *aurasa* son gets the whole inheritance except when there is an appointed daughter's son or a Dattaka son. Of these twelve sons on failure of the first the next in order takes the inheritance and so on. But a Sudra wife's son does not take the whole estate on the failure of the other sons but only a tenth. After dealing with rights of sons Vijnaneswara says:

"The author next delivers a special rule concerning the partition of a Sudra's wealth."

This is the beginning of section 12 at page 35. The text is, "even a son begotten by a Sudra on a female slave may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share; and one, who has no brothers, may inherit the whole property, in default of daughter's sons."

Mr. Venkatarama Sastri strongly urges that, as this verse is in the portion dealing with *apratibandha daya*, it must be taken that the illegitimate son acquires by birth a right in his grandfather's estate in the same way as a legitimate son does. This argument is not correct. In the first place, there is no warrant for saying that this chapter deals only with *apratibandha daya*. In section 1, placitum 3, Vijnaneswara speaks of heritage being of two sorts, *apratibandha* and *sapratibandha*. He goes on to explain what they are. Nowhere is there a statement in the Mitakshara that this chapter is devoted to a consideration of *apratibandha daya* only. Secondly, the property of a mother is dealt with in section 3 at page 12 of the (Setlur's Hindu Law Books) Mitakshara. Thirdly, this portion of the Mitakshara deals, in section 4, with separate property which is not *apratibandha daya*. Fourthly, section 12 is said to be a special rule. The author, having dealt with the rights of legitimate sons, deals with an exception or the special case of the sons of a Sudra born of a woman not married to him. This is not an exception to the general rule but a special case. The opening lines of the next chapter do not help the respondents' contention. Placitum 1 at page 36 says:

"That sons, principal and secondary, take the heritage, has been shown. The order of succession among all on failure of them, is next declared."

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Then follows the text:

"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student; on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This extends to all classes."

The illegitimate son is neither a principal nor a secondary son but is *sui generis* a class by himself.

Sarasvati Vilasa after quoting Yajnavalkya's text regarding the illegitimate son of a Sudra and commenting upon it, says that the illegitimate son of one of the regenerate classes by a Sudra woman receives only maintenance and concludes with the words "Thus ends the chapter on partition of unobstructed heritage" (page 163). This does not mean that what the illegitimate son of a Sudra gets is unobstructed heritage. Unobstructed heritage does not mean joint family property. Vyavahara Mayukha, section 2, placitum 2 (page 66) says:

"This heritage is of two kinds, obstructed and unobstructed When the life of the owner of the property, or that of his sons, etc., is interposed, that is termed obstructed; for instance, the wealth of paternal uncles, and the like. But where ownership accrues to sons and others solely from affinity to the owner, without reference to other means of acquiring property, the heritage is then unobstructed, as the wealth of a father. This is the definition of heritage."

Vyavahara Mayukha dealing with *sapratibandha daya* begins in section 8, placitum 1, page 96, thus:

"Now of the order of succession to obstructed heritage." The fact that section 12 of the Mitakshara immediately follows the rules of inheritance as regards sons and before the right to *sapratibandha* is dealt with, is no ground at all for holding that section 12 deals with unobstructed heritage, if the illegitimate son is not entitled to unobstructed heritage he cannot succeed to the property of his putative father's father independent of the father. He gets a share by the permission of the father, if the division takes place during his life-time. It is urged that their permission only increases the half share to an equal share with the *aurasa* son. Granting it to be so, can it be said that his right is independent of his father's pleasure. Could he sue his father for his share like an *aurasa* son? The Mitakshara contemplates only the case of an householder, a father and sons and grandsons. If one of the sons dies, that son's sons stand in his shoes for purposes of reckoning the shares. A son's death is treated as an elimination of the son from the household and such son's sons take on partition the share that the son would have taken had he lived. The grandson's right to a share in the grandfather's property is, by virtue of his birth, that

is, independent of the father's right and it is equal to that of the father in the grandfather's property. The illegitimate son not having an interest equal to that of the father in the grandfather's property, does not get a share if the father's father divides the inheritance. The same rule would apply where the father's brethren divide the inheritance. His right is that of a person who shares *sapratibandha daya*. It is in this view that he is placed with the sons of daughters where there is no son to share the inheritance with. Where there is a son he occupies an exceptional position. In default, he is put on a level with a daughter's son. The word "daughter" ought to be "daughters" in the translation. In the original the corresponding word is in the plural form and this was brought to our notice by Mr. Varadachari. A good deal of discussion of this case could have been avoided if the mistake in the translation had been brought to our notice earlier. The text means "In default of the sons of daughters" and not a daughter's sons. The expression "daughter's sons" gave rise to the interpretation that it meant "son of an appointed daughter." The correct rendering does away with speculation whether the text did not refer to the appointed daughter's son instead of ordinary daughter's sons. If Yajnavalkya meant that an illegitimate son should take the whole heritage in default of the appointed daughter's son his position would be much higher in the order of sons and his rights would be much more than what they are now. Vijnaneswara and other commentators, who put the illegitimate son along with the sons of daughters, did not push down the illegitimate son but gave him the place which the correct rendering of the text made him occupy.

A daughter's son comes after the widow and the daughter. As Yajnavalkya has already dealt with the case of a wife and daughter, in the text relating to the illegitimate son he mentions the daughter's sons only and that is the reason why the Mitakshara and other commentators give him a place along with grandsons by daughters.

Mr. Venkatarama Sastri relies upon certain passages in Medhatithi, Sarvajna Narayana and other commentators as supporting the position that an illegitimate son gets a share of the *apratibandha daya*. Medhatithi, one of the earliest commentators of Manu, commenting upon verse 179 says:

"He, that is, a son who is born to a Sudra or unmarried '*anuyukta*' woman, such a son who is permitted by his father shall take an equal share with the legitimate son when the father makes a partition during his life-time or if the father says 'Let him have an equal share with you'."

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Sarvajna Narayana says, in the case of a son born to a Sudra on an unmarried female slave or the female slave of a slave he shall take an equal share along with the sons of a married woman, being permitted to do so by his father while alive. Reference is made to a passage from Sarvajna Narayana's text, in *Rajani Nath Das* v. *Nitai Chandra Dey*.[9] It is urged that the term 'sons' include *aurasa* sons and other sons excepting the son begotten on a Sudra woman by a twice-born. Manu recognizes the son of a Brahman by a Sudra woman as a son. Narayana is not prepared to do that. The word "Parasava" son of a Sudra wife has been confounded with the illegitimate son of a Brahman referred to in verse 179 of Manu and that probably led to the later commentators ignoring the Brahman's son by a Sudra wife. These commentators did not say that the illegitimate son of a Sudra acquires by birth an equal right with his father in his grandfather's property.

Balambhatta's commentary on the Mitakshara is relied upon very strongly by the respondent. It is also referred to by Kumaraswami Sastriar, J., in *Subramania Aiyar* v. *Rathnavelu Chetti*.[8] The translation of the relevant passages has been furnished to us. I quote the passages in full as much reliance was placed upon them by the respondent's learned counsel:

"The fact of an illegitimate son taking an equal share by the father's choice where there is an *aurasa* and taking a half-share in the absence of such a direction, and the fact that the adopted boy takes a one-fourth share, where there is an *aurasa* son, shows the weaker character of the *adopted son*. He (the illegitimate son) is also superior to the wife and others because before the text 'wife, etc.' and after mentioning the sons, the Yogi has inserted the text 'Jatopi, etc.'."

"Because also Manu in dealing with the sons begins with Aurasan, Kshetraja, etc., and ends with Parasava, and then mentions the sons in order and then mentions the verse 'Dasyamva' and then adds the text relating to Kshetraja's son, etc., as substitutes for the son and after these introduces the text of 'Brathrunamva'."

"Therefore it is at this point the commentator introduces the text in regard to the division of Sudra's wealth with the words 'here follows special rule in regard to Sudra's property'."

"By the word, 'Visesha' 'विशेष it is indicated that the previous text is confined to the people of the three varnas (regenerate classes). There is, however, no room for the question how, if we say so, the reference to daughter and daughter's son fits in here; for having regard to the two commentaries above referred to about Putrikasuta, पुत्रिकासुत: (i.e., either an appointed daughter or an appointed daughter's son) it is said so, *viz.*, Duhitrunam suthadrithe दुहितृणां सुतादृते. Hence among the substitutes mentioned before it is indicated that in this yuga युगे among Sudras this 'Putrikaputra' पुत्रिकापुत्र: is the substitute son and not the Dattaka दत्तक: son. All

8. (1917) I.L.R. 41 M. 44: 33 M.L.J. 224 (F.B.).
9. (1920) I.L.R. 48 C. 643 at 689 (F.B.).

the texts like Dattaurasa Ithareshamthu दत्तौरसेतरेषां तु relates to the other three classes because of the implication of the word Parigraha परिग्रह. Therefore it is that it is said that Putrikasuta पुत्रिकासुतः is equivalent to *aurasa* son.''

Balambhatta is not an authority in Southern India. Even in the Bombay Presidency he is not considered to be an authority —vide *Bhagwan* v. *Warubai*.[10] Even if he is an authority some of his opinions are so opposed to those of well-known commentators that he cannot be treated as a safe guide. For in the passage following the passage quoted above he says:

"Further the daughter's son is not specifically mentioned here. This is based on the author's theory that in all places where a male is mentioned the corresponding female should be included, *i.e.*, brother includes sister and daughter's son includes daughter's daughter''

and goes on to observe that as among Sudras there cannot be proper religious ceremonies so there cannot be a valid adoption, and adds that, if among the regenerate classes all the ceremonies are not performed, the adopted boy would only become a *dasa* (slave). The opinion that there can be no adoption among Sudras because of their inability to take part in religious ceremonies is opposed to the authorities, and that defective ceremonies, in the case of the regenerate classes make the adopted boy a *dasa*, is not countenanced by any authority. Balambhatta's remark, that wherever a word is used the corresponding female is intended, that is, a brother means or includes a sister, is too revolutionary to be seriously taken notice of. Sarvadhikari in his lectures on Hindu Law says that Balambhatta was a woman who flourished about the end of the 17th century (Hindu Law, page 810). Her exposition of the law of inheritance is not adopted by the Benares school. (*Vide* Sarvadhikari, p. 826.) There is no warrant for saying that the illegitimate son stands in the shoes of an *aurasa* son or even a dattaka son.

Siromani in his 1st edition of Hindu Law owing to an incorrect reading of *Sadu* v. *Baiza and Genu*[11] was of opinion that an illegitimate son could inherit his grandfather's property by birth. In the 2nd edition he corrected this view by reason of the decision in *Jogendro Bhupati Hurrochandra Mahapatra* v. *Nityanund Man Singh*.[12]

Jolly rests his opinion upon West and Buhler.

West and Buhler in their Hindu Law, 3rd edition, say:

"In the case of a Sudra, being an *avibhaktha*, his share, on failure of the three legitimate descendants, is inherited by his illegitimate sons, grand-

10. (1908) I.L.R. 32 B. 300. 11. (1878) I.L.R. 4 B. 37 (F.B.).
12. (1890) L.R. 17 I.A. 128: I.L.R. 18 C. 151 (P.C.).

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sons and great-grandsons If legitimate descendants are living the illegitimates inherit half a share "

The authorities they quote are Manu, Mitakshara, Mayukha and Strange's Hindu Law. They observe at page 82:

"The Sudra's illegitimate son is therefore in a position more analogous to that of a legitimate son, than to that of relations who inherit by a right liable to obstruction Hence it would seem a correct doctrine that those laws which apply to the succession of sons and grandsons of legitimate sons should also be applied to his sons, *i.e.*, that his sons should be considered to represent him, and to take in case he dies before his father, the share which would have fallen to him."

"In favour of this view we may adduce also the fact that the rules treating of the rights of the illegitimate son are given by Vijnaneswara at the end of the chapter on the *apratibandha daya* inheritance by indefeasible right, and form as it were an appendix to it Hence it may be inferred that Vijnaneswara intended all the rules previously given, regarding sons in general, to apply also to him, except as far as they were apparently modified by the text of Yajnavalkya. According to this, the failure of daughters and their sons is necessary before the illegitimate son can inherit the whole property. (*a*) *See* Mit. Chap I, S. 12, and Chap II, S 2, pl 6; and also above S. 3-A (3), page 72."

The statement of law on page 82 is not supported by the authorities on whom the learned authors rely. The illegitimate son's right to share with the legitimate half-brother, though termed *absolute,* is a right which is available if his father is a separated householder. The use of the term *absolute* by West and Buhler does not mean absolute in every case . . .

Sapinda relationship cannot exist when there is no marriage. The illegitimate son cannot be a sapinda of the father though he has the particles of the father in him. An adopted son occupied an inferior position in Manu. As the several forms of marriage came to be discouraged and as the moral consciousness of the people began to increase the feeling that family life should be pure outweighed the desire for sons and the only way of honourably getting a son when the wife did not bear one was by the adoption of a son and this was probably encouraged by the priests on account of the opportunity it afforded them for interfering in family affairs. It was Nanda Panditha who gave the adopted son a high place among sons in his Dattaka Mimamsa. But for Dattaka Chandrika and Dattaka Mimamsa he would not occupy the position he now holds. Practically for all purposes he is considered as good as an *aurasa* son. This elevation of the Dattaka son is no sufficient reason for lifting the illegitimate son from the position he all along occupied on the bare ground that Yajnavalkya gave half the share of an *aurasa* son to an illegitimate son, whereas an adopted son gets only one-fourth share

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of the afterborn *aurasa* son (Mitakshara 33); nor can the illegitimate son be put on a par with the appointed daughter's son by reason of the former sharing equally with the afterborn *aurasa* son, whereas the latter does not. The illegitimate son of a Sudra is not a co-parcener with his father though he may be a co-parcener with his father's legitimate son. In order to get a share of the grandfather's property along with the father's brother or brother's sons he must have acquired by birth an interest in the grandfather's property. He does not, in the case of the grandfather's property, represent the father who had died before separation from his collaterals.

The above is the result of my examination of the original authorities relied on by Mr. Venkatarama Sastri. In *Krishnayyah* v. *Muttusami*[1] the facts were: there were two undivided brothers, *V* and *S*, who belonged to the Sudra caste: *V* died before *S*, leaving two illegitimate sons by *A*, an unmarried Sudra woman kept as a continuous concubine. *S* left two widows: it was held that, although the illegitimate sons of *A* would be entitled to inherit to the estate of *V* they could neither exclude the right of survivorship of *S* nor succeed to the estate of *S*. At page 413 the learned Judges observe:

"While we concede the claim of the illegitimate son we are unable to uphold the contention that he is entitled to take the undivided interest of his father. He is placed in the Mitakshara on the same footing with a daughter's son, and the conception of co-parcenary pre-supposes sapinda relationship and a legal marriage."

In *Ranoji* v. *Kandoji*[2] it was held that the illegitimate son of a Sudra cannot sue the undivided brothers of his father for a share of the family estate. At page 561, Turner, C.J., and Muthuswami Aiyar, J., observe:

"We hesitate to accept the view that Vijnaneswara intended to postpone the widow to the illegitimate son"

This observation of the learned Judges would not have been made, I venture to think, if the correct interpretation of the text was before them. As already shown the plural form of daughter is used in the text and daughters' sons could only have meant sons of daughters, for there could not have been more than one appointed daughter. Further Vijnaneswara, after dealing with the share of the mother and sons, deals with the illegitimate son's rights as a special case and in his time the right of the mother to a share was not challenged and the right of an unmarried

1. (1883) I.L.R. 7 M. 407. 2. (1885) I.L.R. 8 M. 557.

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daughter to a share was not disputed. That was the reason why he gave the illegitimate son a half share along with the sons of daughters. The learned Judges further observe at page 561:

> "All the texts we have cited are found in those portions of the several works which relate to the partition of the estate of separated householders. Do the same rights accrue to a son of a Sudra when his father is unseparated? We can find no Hindu authority on this subject and Messrs. West and Buhler are the only English writers who affirm that they do, but when we look at the authorities cited in support of their opinion, we find they do not support the view."

This opinion, I respectfully say, I have found to be correct on a full examination of the authorities. The contention of Mr. Venkatarama Sastri that the learned Judges who decided *Krishnayyan* v. *Muttusami*[1] and *Ranoji* v. *Kandoji*[2] did not attach sufficient importance to S. 12 being a part of Chapter I which has already been dealt with.

In *Parvathi* v. *Thirumalai*[3] it was held that, in a contest between the illegitimate son of a Zamindar and his widow for possession of the zamindari, the widow was entitled to succeed in preference to the illegitimate son. In that case they relied upon *Krishnayyan* v. *Muttusami*,[1] and distinguished *Sadu* v. *Baisa*[11] and *Jogendro Bhuputi* v. *Nityanund Man Singh*.[12] The authority of this decision may be taken to have been considerably shaken by the decision in *Jogendro Bhupati Hurrochandra Mahapatra* v. *Nityanund Man Singh*.[13]

In *Karuppa Goundan* v. *Kumarasami Goundan*[4] it was held that an illegitimate son was not entitled to a share in the property of his father's brother's sons. The learned Judges observed that they were not prepared to extend the principle laid down in *Jogendro Bhupati Hurrochandra Mahapatra* v. *Nityanund Man Singh*[13] to the case of collaterals in the face of the rulings in *Krishnayyan* v. *Muttusami*[1] and *Ranoji* v. *Kandoji*.[2]

In *Gopalasami Chetti* v. *Arunachalam Chetti*[5] the facts were: The illegitimate son of a deceased Chetti sued the adopted son and the brother of his late father for a share in his father's estate or in the alternative for maintenance. It was held

> "that the claim for a share must fail as it was not shown that the deceased had left any separate or self-acquired property. The family of the deceased (consisting of his father and two sons of whom one was the deceased)

1. (1883) I.L.R. 7 M. 407.
2. (1885) I.L.R. 8 M. 557.
3. (1887) I.L.R. 10 M. 334.
4. (1901) I.L.R. 25 M. 429.
5. (1903) I.L.R. 27 M. 32.
11. (1878) I.L.R. 4 B. 37 (F.B.).
12. (1890) L.R. 17 I.A. 128: I.L.R. 18 C. 151 (P.C.).
13. (1885) I.L.R. 11 C. 702.

was not shown to have had any ancestral property, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship. Inasmuch as the plaintiff's father had predeceased his father and brother, the plaintiff could claim no share as against his grandfather and uncle and, as he was illegitimate, he could not 'represent' his father in the undivided family."

The learned Judges at page 35 observe:

"It is true that in none of the reported cases on the point did there exist, as in the present case, along with the illegitimate son, a legitimate son, by birth or adoption of the deceased 'avibhaktha' or undivided father. But that circumstance cannot make any difference in principle inasmuch as the special rule of inheritance in favour of the illegitimate son of a Sudra, along with his legitimate brothers, provides that, in the absence of legitimate brothers, the illegitimate son may inherit the whole property in default of daughter's sons of the deceased. This clearly shows that the Sudra father therein contemplated is one that was divided from his ancestors and collaterals (*see* West and Buhler, 3rd edition, Vol. I, page 72). But if he was not so divided the text cannot apply, though he may have left legitimate sons along with the illegitimate son."

The modern notion of a joint family is a recent one and the present idea of a joint family is partly due to the notions derived from the English Law of joint tenancy. Joint family as understood now was unknown to Manu and Yajnavalkya and even to Vijnaneswara. What the Mitakshara speaks of is a householder that is *pater famlias*—a father with his sons and grandsons. As I have already shown, when a son dies, his place for purposes of division is taken up by that son's sons, and if he left no legitimate son that son is simply eliminated from the family and the rest of the members divide the estate. The grandsons, in which case, take a share in the family property by virtue of their having by birth acquired an interest equal to that of their father, and as long as the illegitimate son does not acquire an interest equal to that of the father by birth he could not succeed to the property of the grandfather after the father's death.

In *Visvanathaswamy Naicker* v. *Kannu Ammal*[6] it was held that

"the illegitimate son of a Sudra Zamindar is excluded from succession to an impartible zamindari by the widow or the member of the joint family of the deceased Zamindar according as the property is separate or joint family property of the deceased."

It was further held that

"an illegitimate son is not a member of a co-parcenary to which his putative father belonged and cannot succeed to the joint family property in competition with the collaterals of the father. He cannot be a co-parcener with his father's uncles and cousins."

6. (1912) 24 M.L.J. 271.

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The case in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh*[12] was relied upon in that case for the position that the illegitimate son was a member of a co-parcenary. Both Miller and Rahim, JJ., were not prepared to hold that illegitimate son was a co-parcener with his father's collaterals. With reference to *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh*,[12] Rahim, J., observed at p. 285:

"As I understand the decision the text of the Mitakshara already alluded to gives him a share along with the legitimate son of his natural father and that a co-parcenary is thereby created between the two."

It has also been decided that if the illegitimate son dies leaving a son of his own, that son will take his father's share. But I find no warrant for extending the scope of the Privy Council ruling so as to hold that the illegitimate son is a co-parcener along with his father's uncles and cousins. Miller, J., was of opinion that the illegitimate son could succeed to the separate property of the Zamindar.

In *Nagarathnammal* v. *Chinnu Sah*[7] it was held that

"an illegitimate son was not entitled to any share in the family property of his deceased father when there are collaterals in the family."

Sir William Phillips, Offg. C.J., and Anantakrishna Aiyar, J., observed:

"That current of decisions has continued for the last 40 years and there appears to be no case in which the principle has been questioned With all respect we entirely agree with the decision in *Gopalasami Chetti* v. *Arunachalam Chetti*,[8] and, as nothing has been urged before us to show that it is in any way wrong, we are prepared to follow it."

In *Karuppai Nachiar* v. *Sankaranarayanan Chetti*[14] it was held by a Full Bench that

"in the Mitakshara no distinction is made between 'obstructed' and 'unobstructed' heritage in respect of the devolution of stridhanam property. The definitions of 'obstructed' and 'unobstructed' heritage given therein refer in terms only to the property of a male"

and further held that there was no right of survivorship in property inherited by two members of a joint family from their maternal uncle.

The case in *Subramania Aiyar* v. *Rathnavelu Chetti*[5] is the sheet anchor of the respondents' contention. In that case the question was

"whether the father who survives his illegitimate son is entitled to inherit his property when he dies leaving neither issue nor widow nor mother."

5. (1903) I.L.R. 27 M 32. 7. (1927) 53 M.L.J. 861.
8 (1917) I.L.R. 41 M 44: 33 M.L.J. 224 (F.B.).
12. (1890) L.R. 17 I.A. 128: I.L.R. 18 C 151 (P.C).
14. (1903) I.L.R. 27 M. 300: 13 M.L.J. 398 (F.B.).

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The Full Bench consisting of Sir John Wallis, C.J., Oldfield, J., and Kumaraswami Sastriar, J., held that the father could succeed to his illegitimate son's property in the circumstances. The case came on before Sadasiva Aiyar and Napier, JJ., who referred the question to the Full Bench and the point before us was not actually before the Full Bench, but the observations of Sadasiva Aiyar, J., in the referring judgment and some of the observations of Kumaraswami Sastriar, J., in the Full Bench judgment are relied upon by the respondents. Sadasiva Aiyar, J., observes at page 55 that

"an illegitimate son is not connected by blood with his father and mother so as to have sapinda relationship with them, is, in my opinion (with the greatest deference to opinions contra) unsustainable"

He in support of his opinion refers to a passage in the Ramayana in which Hanuman is spoken of as an *aurasa* son. The term *'aurasa'* literally means breast, that is, an *aurasa* son means son of the breast and the corresponding Biblical expression is who came out of the loins. There is no warrant for saying that sapinda relationship could exist in the absence of legitimate marriage. All the Smritis and commentaries confine sapinda relationship to the legitimate issue born of a patni, and in some cases the expression is Dharmapatni. To say that a concubine's son is a sapinda with all the rights and liabilities of an *aurasa* son is, with due respect to the learned Judge not warranted by the Hindu Law texts. The learned Judge after discussing the Madras cases observed:

"It is probably too late to go back on the long course of decisions which have established the contrary."

After referring to the Yajnavalkya Smriti and Mitakshara he remarked:

"It is now settled that in the absence of legitimate sons the illegitimate son takes only a half share if there are widows, daughters or daughter's sons. This looks as if there had been an advancement of these three classes to take along with the illegitimate sons."

The widow, the daughter and the daughter's son were not advanced but the position which the widow and the daughter occupied in the time of Yajnavalkya and Vijnaneswara was in later times given up and they were made to occupy a very subordinate place. At the time, when Vijnaneswara wrote, their position was recognized and that was why he placed an illegitimate son along with the daughter's sons. Kumaraswami Sastriar, J., observes at page 64:

"But for this special provision the illegitimate son of a Sudra would take only in default of all *aurasa* and *putrika putra* or other sons classed by the Smriti writers as superior and the fact that a special text was necessary to give him a favourable position cannot in my opinion be treated as showing

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an intention to exclude him from the category of sons whom the Smriti writers mention as capable of inheriting to their father.''

From the time of Manu the illegitimate son of a Sudra occupied only a subordinate position and got only a share at the pleasure of the father. It was Yajnavalkya that gave him a share and when we find that the legitimate son of one of the regenerate classes by a Sudra woman was given only one-tenth of the property even in the absence of other classes of sons and that Manu treated the illegitimate son of one of the regenerate classes as a corpse it cannot be said that he at any time occupied a position which was equal to any one of the 12 sons mentioned by Manu and Yajnavalkya. The learned Judge relies upon Balambhatta's commentary that the use of the word "hareth" हरेत् in the text of Yajnavalkya indicates that the illegitimate son acquires the right by birth like the legitimate son. As I have already shown Balambhatta is not an authority and if the views of Balambhatta are taken as correct it would revolutionize the whole of Hindu Law. The learned Judge observes at page 66:

> "His position, so far as the Smriti writers are concerned, is by no means inferior to that of a Dattaka.''

The mere fact that he gets a share more than that of a Dattaka son in competition with an *aurasa* son when division is made after the father's death is not a ground for making him one of the sons recognized by the Smritis. Both Manu and Yajnavalkya recognize only twelve classes of sons and the illegitimate son of one of a regenerate class is never treated as a son and only in the case of Sudras the illegitimate son is given a share in the father's property. Whatever may be the reason whether it be that among Sudras concubinage was popular, or, whether it be that the Aryans found the inhabitants of this country whom they compendiously called Sudras marrying without ceremonies, or whether it was the practice to beget children on slave girls, whatever be the reason, in one case and in one case only was the illegitimate son given a recognized position in the matter of inheritance and the share which he got was not by virtue of any right which he acquired by birth but in the first instance by the pleasure of the father and if the father died without dividing the inheritance the sons were directed to give a half share to the illegitimate half-brother. In the case of an appointed daughter's son and Dattaka son they had a definite place in the family and their position was assured. But for the birth of an *aurasa* son, they would take the whole of the inheritance. Owing to the subsequent birth of an *aurasa* son they had to

take a subordinate place. What applied to them cannot be said to apply to an illegitimate son. With great respect I am unable to agree with the learned Judge's view that the illegitimate son had a right to a share in the family property in the beginning and not merely a right to maintenance. In the case of the illegitimate sons of the three regenerate classes the texts distinctly laid down that he is only entitled to maintenance. It is only in the case of Sudras that he was given a share. Even the 11 illegitimate sons had only a right to be maintained in competition with an *aurasa* son. It is only in the absence of the first class the second comes in and in the absence of the second the third comes in and so on till a Sudra wife's son is reached and he gets only one-tenth of the inheritance even though all the previous sons are non-existent. It cannot therefore be said that the illegitimate son was given a share in the beginning and it was subsequently cut down to a right to maintenance. Though in one portion of his judgment the learned Judge treats the illegitimate son as one of the 12 sons, at page 70 he observes:

"I am of opinion that the illegitimate son of a Sudra is one of the classes of sons recognized by Hindu Law and allowed to a Sudra in addition to the 12 classes of sons enumerated as common to all the four castes."

As I have already observed the illegitimate son of a Sudra is *sui generis* and he is a class by himself. At page 72 he observes:

"As between the illegitimate son and his putative father filial relationship exists in my opinion for all purposes of inheritance and succession It would be unreasonable to place the *dasi-putra* in a worse position than the *gudhaja* who is classed amongst heirs and kinsmen."

No doubt some of the sons mentioned by Manu as well as Yajnavalkya are not sons at all; but when the family was small and it was found necessary to have as many sons as possible all that came into the net was considered good fish. As was said by the Psalmist "Happy is the man that has his quiver full of them." In those days when property and person had to be defended against attack from man and beast all the arrows that came into the quiver were considered good and no scrutiny was considered necessary to see whether the arrows really belonged to the man who owned the quiver or were other people's arrows. The considerations which prevailed in days when the family had to be guarded night and day from enemies did not weigh with the law-givers and jurists when the country became settled and life and property became secure. Though concubinage was allowed among the upper classes and though marriages outside the caste were permitted by custom and recognized by law yet at a later stage and in more settled times marriages out of caste

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were given up and illegal connections and marriages were discountenanced and discouraged. In *Thangam Pillai* v. *Suppa Pillai*[15] it was held that among Sudras an illegitimate son is entitled to maintain a suit for partition of the family property against his father's legitimate sons. Muthuswami Aiyar, J., and Wilkinson, J., observed after referring to *Ranoji* v. *Kandoji*[2] and *Rajagopala* v. *Doraisami*, Appeal No. 84 of 1885 (unreported) and *Parvathi* v. *Thirumalai*[3]:

"that the ordinary incident of the status of an illegitimate son was a right to be maintained; that among Sudras a specific share was allotted as a special case on account of the limited importance attached to ceremonial offerings rather than a recognized laxity of marriage tie and that the inferiority of his status in the family was marked by reducing his share and making him a co-heir with the legitimate daughter and her son It was nowhere held that he was entitled to the share allotted to him only by the choice of his legitimate brother, and that he could not recover that share by insisting on partition."

In *Jogendro Bhuputi* v. *Nityanund Man Singh*[13] was held that

"in a Sudra family of the Mitakshara school a *dasi-putra* or illegitimate son by a slave girl is a co-parcener with his legitimate brother in the ancestral estate and will take by survivorship."

Sir Richard Garth, C.J, and Beverley, J., observe at p. 715:

"This case of an adopted son appears to us very analogous to that of an illegitimate son In both cases there is the same sort of imperfect brotherhood to the legitimate son and in both the superior position of the legitimate son is recognised by his receiving a larger share upon partition"

"We see no reason, therefore, why an illegitimate son should be in a worse position than an adopted son as regards his succession by survivorship to the legitimate brother It is obvious that practically speaking in a family composed partly of legitimate and partly of illegitimate sons, the fact of either a legitimate or illegitimate son dying before partition would result in the augmentation of the shares of the survivors upon partition"

and they approved of the decision in *Sadu* v. *Baiza and Genu*.[11] As I have already shown that the mere fact that an adopted son takes a smaller share than an illegitimate son when partition is effected with an *aurasa* son is no ground for holding that the illegitimate son is equal if not superior to the adopted son. By adoption the adopted boy becomes not merely for practical purposes but for all purposes of inheritance and performance of ceremonies a son born of the wife, who participates in the adoption. The reason why the adopted son is given one-fourth share of the *aurasa* son is that the law gives the *aurasa* son the whole of the inheritance and

2. (1885) I.L.R. 8 M. 557. 3 (1887) I.L.R. 10 M. 334.
11. (1878) I.L.R. 4 B 37 (F.B.).
13. (1885) I.L R. 11 C. 702.
15. (1888) I.L.R. 12 M. 401.

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inasmuch as the adopted son has left his family and is prevented by law from entering his natural family he is given a share in the adopter's family. But in the case of the illegitimate son of a Sudra a special rule is enacted and that special rule should not be taken as forming part of the rules of inheritance with regard to legitimate sons. With great respect I am unable to follow the reasoning of the learned Judges. It was only in the case of Sudras that the illegitimate son is given a share. In the case of the regenerate classes he is only entitled to maintenance. The reason of the illegitimate son of a Sudra getting a share may or may not be clear; but the absence of the reason is no ground for holding that his position could be determined by the quantum of the share taken by him in his putative father's property. This decision of the Calcutta High Court was affirmed by the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanund Man Singh.*[12] Sir Richard Couch in delivering the judgment of their Lordships observed at page 156:

"It appears that, in the course of the argument the question was put to the learned Counsel by the Chief Justice as to what would be the case if, instead of the legitimate son being the one who had died, the illegitimate son had died, and the legitimate son survived, and it was apparently admitted that in such a case the legitimate son would take the share of the illegitimate son by survivorship If that be so, their Lordships cannot see any reason for holding that the illegitimate son would not take by survivorship in the case of the death of the legitimate son. It cannot be a different right—in the one case a right by survivorship—and in the other, no right by survivorship."

Their Lordships' approval of the decision in *Sadu* v. *Baiza and Genu*[11] seems to have been influenced by the admission of Counsel. No doubt, if there is a right of survivorship between an illegitimate and a legitimate son, the survivor must succeed to the whole of the property. But, the question is, was there a right of survivorship between the legitimate son and the illegitimate son. If they live as members of a joint family the right to survivorship may exist between the two. It is unnecessary to canvass this position as the decision in *Sadu* v. *Baiza and Genu*[11] is held to be good law and has been followed in several cases.

In *Chinnammal* v. *Varadarajulu*[16] it was held that an illegitimate son of a Sudra was entitled to half the share of his putative father and the widows were entitled to the other half. Collins, C.J. and Handley, J., after referring to *Jogendro Bhuputi* v. *Nityanund Man Singh,*[13] observe:

11 (1878) I.L.R. 4 B. 37 (F.B.).
12. (1890) L.R. 17 I.A. 128: I.L.R. 18 C. 151 (P.C.).
13. (1885) I.L.R. 11 C. 702.
16. (1892) I.L.R. 15 M. 307.

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"This decision of the Calcutta High Court was no doubt dissented from by this Court in *Parvathi* v. *Thirumalai*,[3] and to that extent the authority of that Madras case is shaken by the Privy Council decision, but that does not affect the doctrine established by the Madras cases as to the right of the widow to at least half when the deceased has left no legitimate but only an illegitimate son."

It does not appear from the facts of this case that the legitimate sons and the illegitimate sons formed members of a joint family. If they were legitimate sons they would have succeeded by right of survivorship to the whole of the property.

In *Karuppannan Chetti* v. *Bulokam Chetti*[17] it was held that the sons born of a woman continuously kept by their father as a concubine are, in the case of a Sudra's estate, entitled to equal shares with legitimate sons in a suit for partition, if it is the wish of the father that they should so participate. The learned Judges observe at page 18:

"There is no foundation whatever for the suggestion, that the Mitakshara, Part II, Chapter I, section 12, clause (2) refers only to self-acquired property of the father."

This does not mean that the illegitimate son acquires by birth a right to the grandfather's estate. If the father is a separated householder the illegitimate son gets a right to the father's property.

In *Rahi and others* v. *Govind valad Teja*[18] it was held that among the Sudra class, illegitimate children, in certain cases at least, do inherit. The learned Judges in a very exhaustive judgment considered the texts bearing upon the point. With due respect I may observe that they made a mistake in thinking that the widow was left out when Vijnaneswara considered the rules as to inheritance. They also seem to think that Putrika putra in the text quoted is the appointed daughter's son. That evidently was owing to a mistranslation and the correct translation as pointed above is "daughters' sons" and means "sons of daughters" the word "daughter" being used in the plural form.

In *Sadu* v. *Baiza and Genu*,[11] Nanabhai Haridas, J., held that the illegitimate son and the legitimate son after their father's death formed members of a joint family with rights of survivorship. He observed at page 45:

"It must be allowed, I think, that the position of a *dasi-putra* in a Sudra family does differ in several respects from that of an *aurasa* putra. The latter may, during his father's lifetime, enforce a partition of ancestral property, even against the father's wish. Whether the former can do so has

3. (1887) I.L.R. 10 M 334
17. (1899) I.L.R. 23 M. 16.
11. (1878) I.L.R. 4 B. 37 (F.B).
18. (1875) I.L.R. 1 B. 97.

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not yet formed the subject-matter of a judicial decision but should the question ever arise, it seems very unlikely that any such claim on his part would be recognized seeing that his right to take a share during his father's lifetime is expressly made to depend, 'on the father's choice'."

He goes on to observe that

"while admitting, therefore, that the position of a *dasi-putra* in a Sudra family does differ in important particulars from that of an *aurasa* putra I am not prepared to allow that the former is not a member of the family at all, nor that he is not a co-parcener and not therefore entitled to succeed by right of survivorship His legal status as son is unquestionably recognized and accordingly he inherits from his father even before the latter's widow and if there are *aurasa* putras of his father, he succeeds to the father's estate jointly with them. He is, clearly, therefore, their co-parcener. That he is their brother, not only in the popular but also the legal acceptation of the term is evident from the Mitakshara, Chapter I, section 12 (1) (2) where they are spoken of both by Yajnavalkya and Vijnaneswara as his 'brethren' or 'brothers (Bratarah)'."

The learned Judge is of opinion that the illegitimate son could not enforce a partition during the lifetime of the father. If he cannot enforce partition then he has no right to the property in the father's lifetime. In other words, he does not acquire by birth an interest in the grandfather's property. The observation that the term "Bratarah" used by Yajnavalkya and Vijnaneswara imports an equality of status, I regret to observe, does not follow. The illegitimate son born of a continuously kept concubine is no doubt a son in a sense. According to English jurisprudence an illegitimate son or a bastard is not a son. He is *nullius filius*. But Hindu Law in the case of a Sudra recognizes the sonship of a bastard. The use of the term "bratharum" does not elevate him to an equality with the son of the wife or Dharmapatni. That he is a co-parcener with the father in the sense that he has an equal right with him in the ancestral property is denied by the learned Judge. The father's co-parcener takes the inheritance to his exclusion. He can be co-parcener only with the legitimate half-brother for they are the sons of the same father and live in union as members of a family. If the father was a co-parcener with his brothers or brothers' sons the illegitimate son cannot get a share even if he has a legitimate half-brother if the legitimate half-brother does not seek partition from his uncle or cousins. The adopted son's position is different. He by reason of his adoption becomes a co-parcener with his father and gets a right in the grandfather's property equal to that of the father and therefore it is not proper to place the illegitimate son on a par with the adopted son. Some observations in *Meenakshi* v. *Muniandi Panikkan*[19] are relied upon

19. (1914) I.L.R. 38 M. 1144; 27 M.L.J. 353.

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by the respondents. There the point before us did not arise for consideration. The competition was between the legitimate children and the illegitimate children of a prostitute.

In *Soundararajan* v. *Arunachalam Chetty*[20] it was held that "the illegitimate son of a Sudra by a dancing woman, who was by profession a prostitute before she came into his keeping but who was kept by him in continuous and exclusive concubinage thereafter, is entitled to get his appropriate share in the joint family property after his father's death, provided the connection between his father and mother was not incestuous or adulterous."

The competition was not between the legitimate son and the illegitimate son.

In *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb*[21] it was held that the illegitimate sons of a Raja though they might be his sapindas were not entitled to succeed as heirs to the collaterals of the Raja and consequently they were not entitled to the Stridhanam properties of the Ranis. In that case the illegitimate sons of the late Raja of Tanjore claimed among other things to succeed to the Stridhanam property of the Ranis. Spencer and Kumaraswami Sastri, JJ., disallowed their claim.

In *Dharmalakshman* v. *Sakharam Ramji Rao*[22] on the death of a Sudra his property was claimed by two persons, one of whom was his divided brother and the other was the illegitimate son of his father. *Held*, that the former was entitled to succeed since the illegitimate son was under Hindu Law excluded from all collateral succession. The learned Judges followed *Ravji valad Mahadu* v. *Sakuji valad Kaloji*[23] and *Ramalinga Muppan* v. *Pavadai Goundan*.[24] After discussing the judgment of Sadasiva Aiyar, J., and Kumaraswami Sastri, J., in *Subramania Aiyar* v. *Rathnavelu Chetty*,[8] they observe at page 190:

"The current of decisions is strong and uniform and it would require very clear texts to induce any Court to reconsider the point There is no such express text in favour of allowing the illegitimate son a right to collateral succession. On the contrary, I think that the decisions are fully justified by the Mitakshara and the Mayukha."

Then referring to the text Shah, J., observes:

"It seems to me very difficult to interpret the word भ्रातर: (brothers) used in the text relating to succession as including illegitimate sons of the father in the case of Sudras and excluding them in the case of other classes. Neither Vijnaneswara nor Nilkanta in expounding the text has suggested such an interpretation and according to all recognized rules of

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8. (1917) I.L.R. 41 M. 44: 33 M.L.J. 224 (F.B).
20. (1915) I.L.R. 39 M 136: 29 M.L.J. 793 (F.B.).
21. (1925) I.L.R. 49 M. 116: 49 M.L.J. 568.
22. (1919) I.L.R. 44 B. 185. 23. (1909) I.L.R. 34 B. 321.
24. (1901) I.L.R. 25 M. 519: 11 M.L.J. 399.

construction such an interpretation does not appear to me to be correct. The fact that the same word is used in the immediately preceding text specially relating to Sudras and in the commentary thereon with reference to illegitimate sons in relation to the legitimate sons of the same father does not appear to me to afford sufficient basis for interpreting the same word in two different senses when applied to different classes in one and the same text expressly relating to all classes.'

In *Shamu* v. *Babu Aba*[25] the facts were: The property in suit belonged to one J, a Sudra. In 1878, J passed a registered document in favour of his two illegitimate sons, R and S, declaring that they were like legitimate sons with right of heirship to his properties. After J's death, R and S lived together jointly and enjoyed the property in common. In 1917, R made a will, by which a portion of the property was given to his legitimate son and another portion to a sister of his mistress. The plaintiff contended that R obtained the properties of J by survivorship and could not dispose of them by will. It was held that the two brothers, R and S, after J's death formed a joint Hindu family in regard to the properties in the deed of 1878, which they inherited from J, and R had no power to dispose of them by will. At page 306 the learned Judges observe:

"In any case speaking for ourselves, we are not prepared to take the further step in law we are invited by the appellant to take in this appeal, and to hold that, because an illegitimate brother succeeds to the property in preference to the widow of the deceased legitimate brother and in this sense forms a co-parcenary with the latter, therefore a father and his illegitimate sons living with him, such as Jagoji with Raoji and Sakharam in the manner recited in Exhibit 100, are members of a joint Hindu family in the only legal sense in which the term is used with all its legal implications and consequences; or that Jagoji has such a power in law which he could exercise."

The learned Judges negatived the contention that the illegitimate son was a co-parcener with his father. Where two persons, whether they are legitimate sons or illegitimate sons, are members of a co-parcenary, the right of survivorship obtains among them.

The case in *Gamulal* v. *Kashiram*[26] does not help the respondents. It was held that an illegitimate son was not required to produce succession certificate to his father. That would not make him a co-parcener with his father and give him the right of an *aurasa* son.

In *Arumili Perrazu* v. *Subbarayadu*[27] it was held that in the case of Sudras in the Madras Presidency an adopted son on partition of the family properties shares equally with the sons of the adoptive father born after the adoption. Though in the case

25. (1927) I.L.R. 52 B. 300. 26. (1922) 68 I.C. 417.
27. (1921) I.L.R. 44 M. 656: L.R. 48 I.A. 280: 41 M.L.J. 33 (P.C.)

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of the regenerate classes the adopted son gets only one-fourth share, in the case of Sudras the adopted son takes a share equal to that of the afterborn son of the adoptive father. This decision shows that in the case of Sudras the adopted son takes a much larger share than the adopted son of any one of the regenerate classes. It may be taken that this is an exception to the general rule as to the rights of an adopted son. The Privy Council gave effect to a series of decisions for over a hundred years though there is no text either in the Smritis or in the Mitakshara in support of the position that an adopted son of a Sudra is entitled to half the share or a share equal to that of the afterborn son of an adoptive father.

In *Ram Saran Garain* v. *Tek Chand Garain*[28] it was held that under the Mitakshara school of Hindu Law an illegitimate son of a Sudra, not born of a female slave, cannot claim a share in the family property where his putative father has already parted with his interest in the property during his lifetime; the learned Judges held that an illegitimate son did not acquire an interest in the property of the putative father's father.

In *Rajani Nath Das* v. *Nitai Chandra Dey*[9] it was held by a Full Bench after an exhaustive examination of the original texts that

"the term *dasi-putra* does not necessarily mean the son of a slave-girl but means the son of a continuously kept concubine."

The Calcutta High Court took a different view on the point and this decision brings the law in line with the Madras view.

After a careful and anxious consideration of the original texts and the decided cases, I hold that the illegitimate son of a Sudra does not acquire by birth an interest in the property of his putative father's father and therefore cannot get the father's share if the putative father dies undivided from his brother or brother's sons or other collaterals.

Mr. Varadachari presses three points in his appeal: the first is that the illegitimate son of a Sudra is not entitled to maintenance. This point is covered by distinct authority and it is unnecessary to discuss it at length. In *Vellaiyappa Chetty* v. *Natarajan*,[29] *Ananthaya* v. *Vishnu*,[30] *Subramania Mudaly* v. *Valu*[31] and *Natarajan* v. *Muthiah Chetty*[32] it was laid down that the illegitimate son of a Sudra was entitled to maintenance. Apart

9 (1920) I.L.R. 48 C 643 (F B). 28. (1900) I.L.R. 28 C. 194.
29 (1926) I.L.R. 50 M 340: 52 M.L.J. 229
30 (1893) I.L.R. 17 M. 160.
31. (1910) I.L.R. 34 M. 68: 20 M.L.J. 350
32 (1925) 22 L.W. 650.

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from the authorities there is the further fact that the plaintiff's mother brought a suit, O. S. No. 35 of 1914, on the file of the Subordinate Judge of Kumbakonam for maintenance for herself and the plaintiff. Maintenance was decreed and the decision in appeal is reported in *Panchapagesa Odayar* v. *Kanaka Ammal*.[33] The point having been decided between the parties it is difficult to see how the question can be raised now.

The next point urged by Mr. Varadachari is that the present suit is barred by reason of the decision in O.S. No. 35 of 1914 on the file of the Subordinate Judge of Kumbakonam which came up on appeal as A.S. No. 121 of 1916. In that case the plaintiff's mother claimed maintenance for herself and the plaintiff who was a minor at the time and who was impleaded as a plaintiff. In the plaint it was definitely stated in paragraph 7 that

"under these circumstances the 1st defendant is bound by law, justice and custom, to pay out of the family properties inclusive of the properties of the said Venkataramana Odayar in his possession, the amounts necessary for maintenance, apparel, etc., until the 2nd plaintiff attains majority or during the life-time of the plaintiffs and until the minor daughters are married," etc.

In paragraph 12 the averment is:

"As the 2nd defendant is the undivided son of the 1st defendant and therefore entitled (to a share) in the family properties and as the 2nd defendant is bound to maintain the plaintiffs, etc. and to make some arrangement in respect of the suit, he has been added herein as a party."

In prayer 1 there is a direction to the defendants to pay plaintiffs in advance in two instalments a year the sum due at the rate mentioned below for maintenance, apparel and other expenses of the plaintiffs and of the said girls until the 2nd plaintiff attains majority and gets his share in the family properties or during the life-time of the plaintiffs, for the expenses of his education, etc., of the 2nd plaintiff and for house rent. The phrase "during the life-time of the plaintiff" is relied on as showing that the prayer in the plaint was for maintenance for life of the present plaintiff. When the averments in paragraphs 7 and 12 are to the effect that the 2nd plaintiff is entitled to maintenance till he could bring a suit for possession of the family properties it is not proper to attach any importance to the expression "during the life-time of the plaintiffs" as showing that the prayer was for maintenance of the plaintiff during his natural life. No plea was raised as to the maintenance of the plaintiff after the period of minority and no issue was framed as regards the liability of the defendants to maintain the plaintiff after he attained majority and the learned Judge who

33. (1917) 33 M.L.J. 455.

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decided the case specifically stated in paragraph 28 of his judgment:

"In the result there will be a decree for plaintiffs entitling each of them to receive maintenance at Rs. 20 per mensem from defendants 1 and 2 during the period of the natural life of the 1st plaintiff and till 2nd plaintiff attains majority."

It is urged that the decision is either *res judicata* under section 11, Civil Procedure Code, or that it is barred by O. 2, R. 2. Clause (5) of section 11 is as follows:

"Any relief claimed in the plaint which is not expressly granted by the decree, shall, for the purposes of the section, be deemed to have been refused."

Plaints in the mufassal are as a rule prolix and contain a number of unnecessary averments. They should not be construed too strictly and in construing a plaint the whole of the plaint must be considered and not a stray clause here or a stray clause there. When the plaint contains distinct averments that the 2nd defendant is the undivided son of the 1st defendant and therefore entitled to a share in the family properties and the plaintiff is entitled to maintenance till he attains majority or until he is able to sue for a share it would not be right to attach any importance to the phrase in the prayer "during the life-time of the plaintiffs." The plaint was not understood by the defendants as containing a claim for maintenance during the natural life of the second plaintiff. If that was so a distinct issue would have been raised and it would have been considered. In applying the rule of *res judicata* as contained in section 11 the Court should not be guided by stray clauses here and there but should consider the averments in the plaint and the contentions of the parties and the issues raised and the decision thereon. I hold that the present suit is not barred by the principle of *res judicata* on account of the decision in A.S. No. 121 of 1916.

It is next urged that the suit is barred by Order 2, Rule 2, which says that

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action"

This rule does not apply to the present case. The mother sued for the maintenance of the plaintiff during his minority and left the right of the present plaintiff to be fought out after he became a major. She asked for maintenance for herself and for her minor son and daughters and she was not bound to claim on behalf of the plaintiff his share of the family properties. I do not think there is anything in this contention.

The next point is as regards the rate of maintenance. The plaintiff claims Rs. 300 a month. The learned District Judge

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awarded one-thirtieth of the family income which comes to Rs. 110. The plaintiff has preferred a Memorandum of Objections against this portion of the decree. The question is what is the proper amount. It is urged for the appellants that, being an illegitimate son, he should be given only just enough to live on. In all cases of maintenance the Court has to see what the position of the plaintiff claiming maintenance is and what the income of the family is. Though the plaintiff may be an illegitimate son yet he is the illegitimate son of a wealthy man who, during his lifetime, maintained him in affluence and treated him as a son. When a man is accustomed to a certain mode of life he should not be made to suffer by reason of something for which he is not responsible. Where the family income is sufficient it is but just that those who have a claim upon it should be given a reasonable amount. The finding of the learned Judge is that the total income of the family is Rs. 43,000 a year. If the plaintiff's father had divided from his brother before his death the plaintiff would have been entitled to half the father's share and his income would have been at least Rs. 10,000 and odd. The plaintiff, as appears from the evidence, was treated by the father as if he was going to inherit the property. In other words, he treated him as a son. Taking all the circumstances into consideration I think it would not be too much to award him maintenance at the rate of Rs. 250 a month which will be a charge on the family property. In this view it is unnecessary to consider the cases *Gobinda Rani Dasi* v. *Radha Ballabh Das*,[34] *Ananthaya* v. *Vishnu*,[30] *Subramania Mudaly* v. *Valu*[31] and *Natarajan* v. *Muthiah Chetty*.[32] Each case depends upon the circumstances appearing in it and no hard and fast rule can be laid down to govern all cases. The Court should not be niggardly in awarding maintenance where the person claiming maintenance has been accustomed to a certain mode of life and when the amount of maintenance awarded would not be a hardship upon the family which enjoys the whole of the income of the family property.

The next point is as regards arrears. The learned Judge has not given arrears of maintenance to the plaintiff and he does not give reasons for his refusal. The plaintiff being entitled to maintenance it is but proper that he should be paid the arrears of maintenance. It is not necessary that there should

30. (1893) I.L.R. 17 M. 160.
31. (1910) I.L.R. 34 M. 68: 20 M.L.J. 350.
32. (1925) 22 L.W. 650.
34. (1910) 7 I.C. 118.

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be a distinct demand in cases of maintenance in order to sustain the claim for the arrears. Vide *Parwatibai* v. *Chatru Limbaji*.[35] It is suggested for the appellants that the plaintiff was given a small amount during his minority and therefore he should be given the arrears only at that rate. It does not appear that the appellants offered to pay the small amount of maintenance that was decreed during the minority after he attained majority. The attitude that they took up was that he was not entitled to anything. That being so there is no reason why the plaintiff should be given the arrears of maintenance at the rate decreed in A.S. No. 121 of 1916. That rate was fixed only during his minority. After he attained majority different considerations arise and I see no reason to refuse him arrears of maintenance at the rate awarded by this Court.

The respondent wants an increase of the amount given for his marriage expenses. I do not see any reason to increase the amount which I consider to be sufficient for his marriage expenses.

The plaintiff claims a house to live in. The amount we have awarded is sufficient for his maintenance and as he is not a member of the family he has no right of residence in the family and therefore he is not entitled to be given a house to live in.

In the result the appeal is dismissed with costs and the memorandum of objections is allowed to the extent of Rs. 250 a month with arrears. Parties will pay and receive proportionate costs on the memorandum of objections including Advocates' fee. Two sets of Vakils' fee under Rule 46 payable to appellant.

Pakenham Walsh, J.

Pakenham Walsh, J.—The plaintiff in this case, one Gopala Odayar, is the illegitimate son of one Venkataràmana Odayar. The latter had a brother, Panchapakesa Odayar, who is dead leaving sons who are the 1st and 2nd defendants. The 2nd defendant has been adopted to another family and so has been struck off. The 3rd defendant is Panchapakesa Odayar's widow and the 4th and 5th defendants are the widows of Venkataramana Odayar. The plaintiff sued as the illegitimate son of Venkataramana Odayar for a moiety in the family properties and in the alternative to maintenance. The first claim was disallowed in the Lower Court and he was granted maintenance at the rate of Rs. 110 a month with an allowance of Rs. 750 towards marriage expenses. Defendants

35. (1911) I.L.R. 36 B. 131.

1 and 3 have appealed against the decree alleging in the main two legal grounds for holding that a decree for maintenance cannot be made in this case and further objecting to the quantum of maintenance allowed. A memorandum of cross-objections has been put in by the plaintiff against the decision of the Lower Court holding that he is not entitled to a share in the family properties and also against the quantum of maintenance awarded. The cross-memorandum of objections as involving the most important point was argued first.

It was admitted that as the law stands at present the ruling of the Lower Court that the plaintiff is not entitled to a share in the joint family property is correct but the plaintiff has asked us to make a reference to a Full Bench as to whether the decisions in *Krishnayyan* v. *Muttusami*,[1] *Ranoji* v. *Kandoji*,[2] *Parvathi* v. *Thirumalai*,[3] *Karuppa Goundan* v. *Kumarasami Goundan*,[4] *Gopalasami Chetti* v. *Arunachalam Chetti*,[5] *Visvanathaswamy Naicker* v. *Kamu Ammal*[6] and *Nagarathnammal* v. *Chinnu Sah*[7] were correct. It is urged that doubt has been thrown on the correctness of these decisions by the decisions in *Thangam Pillai* v. *Suppa Pillai*,[15] *Chinnammal* v. *Varadarajulu*,[16] *Karuppannan Chetti* v. *Bulokam Chetti*,[17] *Ramalinga Muppan* v. *Pavadai Goundan*,[24] *Subramania Aiyar* v. *Rathnavelu Chetty*[8] and certain remarks in *Soundararajan* v. *Arunachalam Chetti*[20] as well as in some other cases quoted. It may be stated at the outset that not a single case has been decided on the point in question in favour of the plaintiff's contention, but the argument is that if other decisions are pressed to their logical conclusions and if certain remarks, which are really *obiter*, in those cases be taken into account, there is sufficient room for doubting whether the uniform course of decisions has been correct and whether a reference should not be made. It will be seen therefore that the plaintiff-respondent's learned advocate has got to make out a very strong case before he can show that a reference should be made questioning a course of decisions uniform for forty years, and especially is this so in a matter of succession. Their Lordships of the Privy Council have remarked:

1. (1883) I.L.R. 7 M. 407
2. (1885) I.L.R. 8 M. 557.
3. (1887) I.L.R. 10 M 334.
4. (1901) I.L.R. 25 M. 429.
5. (1903) I.L.R. 27 M. 32.
6 (1912) 24 M.L.J. 271.
7 (1927) 53 M.L.J. 861.
8 (1917) I.L.R. 41 M. 44: 33 M.L.J. 224 (F.B.).
15. (1888) I.L.R. 12 M. 401.
16. (1892) I.L.R. 15 M. 307.
17 (1899) I.L.R. 23 M. 16.
20. (1915) I.L.R. 39 M. 136 at 152: 29 M.L.J. 793 (F.B.).
24. (1901) I.L.R. 25 M. 519: 11 M.L.J. 399.

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"To alter the law of succession as established by a uniform course of decisions, or even by the dicta of received Treatises, by some novel interpretations of the vague and often conflicting texts of the Hindu Commentators, would be most dangerous, inasmuch as it would unsettle existing titles"—vide *Thakooram Sahib* v. *Mohun Lall*[36]

In this case, there is also the objection that if the view contended for by the plaintiff is correct, we should be introducing into Southern India or at least into some parts of it a novelty in the shape of a co-parcenary family some of whose members are females.

It may be as well at the outset to state the law as it stands at present by the decided cases. The claim of a Sudra's illegitimate son to succeed to his putative father's estate depends upon a text of Yajnavalkya which also appears in a shorter form in Manu. The text, which, as quoted by Vijnaneswara, is really the last half of sloka No. 133 and the whole of sloka No. 134 runs as follows:—

"A son begotten on a *dasi* by a Sudra becomes even the partaker of a share by (the father's) choice

After the death of the father, the brothers should make him a half-sharer. An illegitimate son of a Sudra, if brotherless, can take the whole, unless there is a son to (any of) the daughters (of the Sudra)" (pp 219 and 220 of Mandlik's work).

I have given this translation of Mandlik rather than that which is found in Setlur's work, because we find in the latter "in default of daughter's sons" with the apostrophe in the singular, whereas the word "Duhitrunam" दुहितॄणाम् is plural in the original text. This difference between the genitive singular and the genitive plural is of considerable importance because of a certain argument that has been raised on the supposition that it is a genitive singular with which I shall deal later. Now all the decisions have held that the property to which a Sudra's illegitimate son can succeed under this text is the property of a separated father and that he is not a co-parcener with his father's undivided brothers, nor can he succeed to his father's collaterals. This has been the uniform course of the Madras decisions and those of other Indian High Courts and the learned Judges have steadily refused to extend the rights of a Sudra's illegitimate son so as to make him either a co-parcener with his father's undivided brothers or a successor to his father's collaterals. In the Calcutta High Court, it was held during a long series of cases that as a female slave, "dasi," was extinct in these days, a "dasiputra" could not exist and that the text for practical purposes had ceased to be operative at all,

36. (1867) 11 M.I.A. 386 at 403.

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but the decision in *Rajani Nath Das* v. *Nitai Chandra Dey*[9] overruled this catena of decisions and brought the Calcutta view into uniformity with that held in Madras. In *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh*,[12] which went up to the Privy Council, it was held that under the Mitakshara, among Sudras, where a father left a son by a wedded wife, and an illegitimate son, the ordinary rule of survivorship incidental to a family co-parcenary applied, and the illegitimate son, having survived the legitimate, was held entitled by survivorship to succeed to the family estate on the death of his brother without male issue. This was an impartible estate but the rules applicable were the ordinary rules pertaining to a Sudra family under the Mitakshara. In *Thangam Pillai* v. *Suppa Pillai*[15] it was laid down that an illegitimate son of a Sudra could maintain a partition suit against his legitimate brother. In *Chinnammal* v. *Varadarajulu*[16] it was held that an illegitimate son and his father's widow would divide the family property equally in default of legitimate sons. The same principle was affirmed in *Karuppannan Chetti* v. *Bulokam Chetti*[17] as regards his dividing equally with the legitimate sons. In *Ramalinga Muppan* v. *Pavadai Goundan*[24] it was held that the legitimate son of a Sudra's illegitimate son was entitled to take the share in the property which his father would have taken had he survived. In *Subramania Aiyar* v. *Rathnavelu Chetti*[8] it was held that where an illegitimate son, who, if he had survived his putative father, would have inherited his estate either alone or along with others, dies leaving no issue, widow or mother, his putative father is entitled to succeed as his heir. This is as far as the Courts have gone.

But as the matter is of considerable importance, we permitted it to be argued and this has been very fully and ably done by both sides. The main arguments in plaintiff's favour may be summed up thus: that the illegitimate son of a Sudra stands on a level with the other sons except as regards the amount of property to which he is entitled, that his right to represent his father cannot be prevented by the survivorship of his father's undivided brothers, that the text of Yajnavalkya in the Mitakshara occurs in Chapter I which deals with un-

8. (1917) I.L.R. 41 M. 44: 33 M.L.J. 224 (F.B.).
9. (1920) I.L.R. 48 C 643 (F.B.).
12. (1890) L.R. 17 I.A. 128: I.L.R. 18 C. 151 (P.C.).
15. (1888) I.L.R. 12 M. 401. 16. (1892) I.L.R. 15 M. 307.
17. (1899) I.L.R. 23 M. 16.
24. (1901) I.L.R. 25 M. 519: 11 M.L.J. 399.

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obstructed or apratibandha inheritance, that hence the property cannot be confined to the property of a separated householder and that the verse in the Mitakshara really represents a cutting down and not an enlargement of the rights of a Sudra's illegitimate son compared with what he had been entitled to previously.

The argument founded on the order of the Mitakshara is evidently not new and has been urged before but has not found acceptance. However, as it has not been set out in much detail in previous judgments and as it forms the principal weapon in the armoury of the plaintiff, it may be useful to give it in some detail here. It is important to note in the first place that Vijnaneswara does not state that he is first of all going to deal with unobstructed and then with obstructed inheritance. Chapters, sections and headings of course do not occur in the original. The first placitum runs thus:

> "Evidence, with reference to its classification into human and divine, has been explained; the partition of heritage is now explained by the Image of Holiness" (*i.e.*, Yajnavalkya).

Placitum 2 says:

> "Here the term heritage (*daya*) signifies that wealth which becomes the property of another, solely by reason of (his) relation to the owner,"

and placitum 3:

> "It is of two sorts, unobstructed (Apratibandha) or liable to obstruction (Sapratibandha)"

which Vijnaneswara then proceeds to define. Placitum 4 defines "Partition" (Vibhaga). Then follows a consideration of the texts from Yajnavalkya, the last of which in the Chapter is the one and a half slokas dealing with a Sudra's illegitimate son. Chapter II begins: placitum No. 1

> "That sons, principal and secondary, take the heritage, has been shown The order of succession among all on failure of them, is next declared."

It is quite true that some commentators, and noticeably Sarasvati Vilasa, in commenting on Yajnavalkya, regard this verse about the Sudra's illegitimate son as ending the discussion on partition of unobstructed heritage. *Vide* paragraph 398 of Sarasvati Vilasa at page 163 of Setlur's work on Inheritance. But it appears to me, as argued for the appellants, that the divisions might as easily be regarded as (1) Partition by sons during their father's life-time; (2) Partition by sons after his death. Then comes in Chapter II (3) Partition of the family property where there are no sons on the death of the father. In Setlur's Sanskrit edition of the Mitakshara with Visvarupa and Subhodhini Balambhatti, Chap. I, is headed अथ दायविभागप्रकरणम् "Atha Dayavibhaga Prakaranam". Here begins the explanation about the partition of wealth, and this section of the work

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is evidently one primarily on partition. Vijnaneswara in section 1, placitum 6 says distinctly that he is going to deal with *partition*, the time, the manner and the persons, when, in which, and by whom it may be made. These three points, he says, he will explain in the commentaries on the stanzas on these subjects respectively and the fourth matter as to what properties are to be divided, he proposes to deduce from other sources. It is also to be noted that Vijnaneswara was not free to follow his own method, even if he had one in mind, because he had to take the texts of Yajnavalkya in their order. It is at least quite clear (as pointed out for the appellants) looking to placitum 3, that he included self-acquired property in the class of unobstructed inheritance of apratibandha daya because he states that the existence of a son and the existence of the owner are impediments to the succession.

So it may be granted without any detriment to the view of the case-law which is sought to be controverted that Chapter I does deal with unobstructed inheritance and Chapter II with obstructed inheritance, but I cannot accept the further contention sought to be forced upon us that all the property dealt with in Chapter I is the father's heritable property and that it is not permissible to confine any property mentioned in this chapter within any narrower limit. This is a position which clearly cannot be sustained. In the very first text dealt with in section II which allows the father to give equal or unequal shares to his sons as he pleases, Vijnaneswara finds himself obliged to restrict this to the father's self-acquired property saying that in ancestral property the father has no such right. He says in Placitum 6,

"this unequal distribution is allowed in respect of his self-acquired property. But, if the wealth descended to him from his father, an unequal partition at his pleasure is not proper; for equal ownership will be declared"

It was sought to meet this by arguing and quite probably correctly, that Yajnavalkya was really in this sloka referring to ancestral property but that conditions having changed and the policy of the Mitakshara being as is well known to cut down the "patria potestas", the author had to place this limited construction upon Yajnavalkya's text, and it is therefore argued that Yajnavalkya was still keeping in mind the principle that he was dealing with ancestral property in this part of his work. But the next section No. III is absolutely fatal to this contention. Here the text considered is "Let sons divide equally both the

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effects and the debts, after their two parents," and the sloka goes on to say

"the daughters share the residue of their mother's property after payment of her debts."

Here Yajnavalkya deals with the mother's property which is not ancestral at all. If the sons were to succeed to it, it might have been urged that it might have been incidentally introduced in talking of sons succeeding to their father's ancestral estate, but as Yajnavalkya was going to lay down that the daughters succeed to their mother's property, there was absolutely no need for him to mention the mother's property or to deal with the case of partition after the death of *both* parents if he was confining himself to ancestral property. Section IV deals with self-acquired property of a co-parcener, which is again obviously not ancestral property nor even the self-acquired property of the father. These texts make it perfectly clear to my mind at least that the principle which is guiding Yajnavalkya throughout is the discussion of partition and not the distinction between ancestral and separate property. Section VII also which considers the text "Of heirs dividing after the death of the father, let the mother also take an equal share" must refer to the case of a father who dies separate. With this section standing in Chapter I where it does, it is impossible to contend that section XII cannot refer to the property of a separated father and it is interesting to note that the word "haret" हरेत् to which I shall refer later, is used in both sections, in section VII as regards the mother and in section XII as regards the illegitimate son. The contention contra urged on behalf of the appellants that in each of these texts we are to determine the nature of the property by the nature of the text itself is exactly that which has been followed by Vijnaneswara himself as is seen from section II mentioned above. That is the principle on which the Courts have apparently dealt with the text in question. Finding in that text that daughter's sons, which must mean "as far as daughters' sons" (since widows and daughters had already been dealt with by Yajnavalkya) are to share the property with the illegitimate son who has no legitimate brothers, they have deduced that the property spoken of must be the property of a separated householder. It is in this connection that the genitive plural "duhitrunam" दुहितॄणाम् in the text is of importance. Suggestions have been made that the text originally referred to an "appointed daughter's" sons and that this having been lost sight of, widows and daughters were

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afterwards introduced even in preference to a daughter's sons. There can be only one appointed daughter and therefore it seems clear that the text did not refer to the sons of an appointed daughter. This renders it unnecessary to consider passages from Muller's "Sacred Books of the East" which have been quoted to us to show that in reading the texts of Manu we may introduce the word "appointed" before the word "daughter" where the context required it. In fact, this genitive plural "duhitrunam" deals a fatal blow to the plaintiff's contention that the illegitimate son of a Sudra ranks as a real son inheriting to his father exactly like the other sons but merely taking a smaller share of the property. I am of opinion that we must construe the property referred to in the text in question by the text itself, which is a special provision and if that is done, the inclusion of daughters' sons as heirs sharing the estate of the illegitimate son in default, of legitimate sons would at once suggest that the property referred to is the property of a separated householder.

The next contention is that this illegitimate son is equal to a legitimate son in every way except as regards the extent of the property which he takes. The learned Advocate for the plaintiff practically admitted that he has not one important right of a legitimate son, namely, that of claiming a partition with his father. But it was argued that the lack of this right does not exclude recognition of his right in his father's property by birth and in this connection section V, placitum 10 of Vijnaneswara was quoted where he states:

"Although he (that is, the grandson) have right by birth in his father's and in his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his self-acquired property".

The emphatic opinion of Medhatithi quoted in *Rajani Nath Das* v. *Nitai Chandra Dey*,[9] the opinion of Sarvajna Narayan's commentary on Manu quoted on page 689 of the same judgment, the commentary of Balambhatta quoted in *Subramania Aiyar* v. *Rathnavelu Chetty*[8] and the verse of Manu "Neither brothers, nor parents, but sons, are heirs to the estate of the father"—quoted in section 11, placitum 33 by Vijnaneswara—are relied on to show the high standing of the illegitimate son of a Sudra. There is no doubt that Medhatithi's

8. (1917) I.L.R. 41 M 44 at 65: 33 M.L.J. 224 (F B)
9. (1920) I.L.R. 48 C. 643 at 688 (F.B.).

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expression सुत एव is very emphatic and with due respect I agree with the contention of the learned Advocate for the plaintiff that this emphasis is not sufficiently brought out in the translation of the passage on page 688 of the report which runs:

"This is the son begotten by a Sudra on a woman though not married to him (anoorhaya) or appointed (for raising issue) (aniyuktaya)",

and that the emphatic सुत एव (Suta · *Eva*) might be better brought out if the sentence were translated thus: "One begotten, etc.—is *verily* a son". It is also true that Vijnaneswara himself knew of Medhatithi's commentary on Manu, for he mentions him in section 7, placitum 13. Still Vijnaneswara and not Medhatithi is the authority we have to follow and one cannot conclude that because he mentions Medhatithi he agreed with him on the point. Balambhatta no doubt infers from the word "hareth" हरेत् that the illegitimate son takes like a legitimate son, a point which has been mentioned by Kumaraswami Sastri, J. (now Sir Kumaraswami Sastri, J.) in *Subramania Aiyar* v. *Rathnavelu Chetty*,[8] whose judgment is one of the main reasons urged on us for making a reference. But Balambhatta gives the illegitimate son of a Sudra preference over even the adopted son, who, he says, is only a dasa. Balambhatta is not an authority in this presidency and he goes to such lengths in favour of women that it has been even thought that his commentary was written or at least inspired by a woman. (For remarks on Balambhatta, see *Bhagwan* v. *Warubai*.[10]) As regards the use of the word "haret" हरेत् in the text, it has been pointed out to us that the same word occurs in verse 123 which refers to the mother taking a share when the sons divide after the death of their father. Here clearly the mother does not take by right of birth, so that Balambhatta's argument founded on the use of the word "haret" fails. Narayana's commentary is of course very strongly in favour of the illegitimate son under this verse, for he says "Directed by the father, he takes a share, but not that not so directed he takes only maintenance." Vide *Rajani Nath Das* v. *Nitai Chandra Dey*.[9] I find myself unable to agree with the translation which the appellants' learned advocate suggests, namely, that we should put a fullstop at the end of 'नतनुज्ञातस्तु' and read it "directed by his father he takes a share but not at

8 (1917) I.L.R. 41 M 44: 33 M.L.J. 224 (F.B.).
9. (1920) I.L.R. 48 C. 643 at 689 (F.B.).
10. (1908) I.L.R. 32 B. 300 at 304 to 311.

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all if not directed.'' No authority has been quoted for such a translation and it leaves the next words "जीवनमात्रं हरेदिति" "(let him take maintenance)" in the air. However, Narayana is also not an authority in the Madras Presidency. As regards the text from Manu in section 11, placitum 33 of Setlur's work quoted above, it has been strongly urged before us for the respondent that as this text in Manu, Chap. IX, verse 185, follows the text regarding the Sudra's illegitimate son in verse 179, it was evidently intended to include him as one of the sons referred to who took in preference to brothers. We are not in the position of basing the law on Manu nor even on Yajnavalkya but only on Yajnavalkya as expounded by Vijnaneswara. The text in Manu runs.

"a son who is (begotten) by a Sudra on a female slave or on the female slave of his slave may, if permitted (by his father), take a share (of the inheritance): thus the law is settled'' (Muller's Sacred Books of the East, Vol. XXV, p. 364).

It is to be noted that there is nothing said in Manu in verse 179 as to whose permission is required for the Sudra's illegitimate son to take a share. Some commentators have held that it is the permission of the brothers and some even that it is that of the Sovereign, to whom the estate would otherwise escheat, that is required. The latter is the opinion of Vishwarupa. (*Vide* his commentary on Yajnavalkya, Book II, verses 133 and 134, quoted on page 692 in *Rajani Nath Das* v. *Nitai Chandra Dey*[9]). There is this basic difficulty in the claim put forward for the illegitimate son ranking equally with legitimate sons, either on the text of Manu or on of Yajnavalkya. He is not one of the twelve sons recognized in Manu. Yajnavalkya's list of twelve sons does not, it is true, coincide with that of Manu. He leaves out the "parasava" (living corpse) the son whom a Brahmana begets through lust on a Sudra female, and makes up the number by adding the "putrika" son whom Manu provides for separately; but he also does not include the Sudra's illegitimate son in the list of twelve sons. The learned advocate for the plaintiff-respondent had to admit that a Sudra's illegitimate son could not be found referred to in any section until we come to this section 12. Further, while in Manu the principal and subsidiary sons take in default of the son of higher rank, the Sudra's illegitimate son is in a different category altogether. He takes his share or half-share (whichever it may be) not in succession to any class of sons but apparently with

9. (1920) I.L.R. 48 C. 643 (F.B.)

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them. So the Sudra's illegitimate son cannot be said to be in Manu at all in the same category as the twelve sons just mentioned before by him. Any argument attempted to be founded upon the order in which he appears in Manu clearly disappears when we come to Yajnavalkya. As mentioned above, the verse in section 12 is really the second half of sloka 133 added to 134. The first part of sloka 133 is "this law is propounded by me in regard to sons equal by class." The differences in sons due to the caste of the wives having vanished in Yajnavalkya, the classification was one by legal right, so that the claim of the sons equal on this basis ends naturally, as Vijnaneswara makes it do, in the middle of sloka 133 and it cannot therefore be argued that a Sudra's illegitimate son was meant to be put in the same class. The whole classification of sons in Yajnavalkya proceeds on a different basis from that in Manu. Yajnavalkya confines his list so as to apply to persons of equal class and his text No. 133 would not have been applicable if he had taken Manu's list since it would not have applied to the last of the twelve sons in Manu, that born by a Sudra wife to a Brahman. Yajnavalkya is concerned with providing for sons of married wives. In Manu, the son of a Brahman by a Sudra woman is one of the twelve sons though he gets nothing at all, while according to Yajnavalkya he would get maintenance. In the Mitakshara, the Sudra's illegitimate son does not inherit in default of an *aurasa* son, but in certain contingencies along with him. In the cases of the twelve other sons mentioned in the Mitakshara, there is no question of their sharing with the widow, daughter or daughters' sons. So it is clear that the Sudra's illegitimate son mentioned in section 12 stands on a footing quite different from that of the twelve sons previously mentioned. In the text under consideration we find therefore several features which go strongly to support the view that it is a special text introducing a special rule and that the illegitimate son does not stand on the same footing nor is the property referred to the same as in the case of legitimate sons. The father has evidently a choice at least as regards whether he will give him more than half the share, a position which under the Mitakshara the father cannot occupy except with reference to his separate property. Then it is to be noted that it is said that the brother should make him a half-sharer after the father's death, not that he should take as a half-sharer, and lastly, we have the inclusion of daughters' sons with whom he is to share the property.

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I next come to the argument sought to be founded on representation. It has been strongly pressed that the only logical conclusion from the decision in *Subramania Aiyar* v. *Rathnavelu Chetti*,[8] that the putative father succeeds to his illegitimate son is that the illegitimate son represents his father and that he must therefore represent him for all purposes and for all his property. It has been frequently observed that the scheme of Hindu Law is not a logical one. Their Lordships of the Privy Council in considering the text in question in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanund Man Singh*[12] say emphatically "it cannot be said that at his birth he (*i.e.*, the illegitimate son) acquires any right to share in the estate in the same way as a legitimate son would do." We are told that this is an *obiter dictum* and was not necessary for the determination of that particular case. But it is a dictum of very great weight being founded on a consideration of the text in question. It has been pointed out to us by the learned Advocate for the appellants that the law of representation as considered by Vijnaneswara in section 5 is clearly with reference to the grandsons' right to a share in the grandfather's property. They are distinctly stated in placitum 2 to have *by birth* a right in their grandfather's property. Their father's position if he dies is merely taken to show the quantum to which his sons will be entitled and it is to be noted that the word used in the commentary is the adjective Pitriyam पित्रियम् and not the genitive पितु: (of the father), and so also in the text of Yajnavalkya itself the word is पितृत: "according to fathers," and so translated both by Colebrooke and Mandlik. It is the distribution of the grandfather's property and not the right to it that is adjusted through the respective fathers, so that the property is not contemplated as descending from the father. The decisions have uniformly held that the co-parcenary of the illegitimate Sudra son with his legitimate brothers is caused only by the death of the father and it has never been held that the illegitimate son is a coparcener with his father still less a coparcener with his father's coparceners. In *Dharma Lakshman* v. *Sakharam Ramji Rao*,[22] in which the case most strongly pressed upon us *Subramania Aiyar* v. *Rathnavelu Chetti*,[8] was considered, a very decided opinion was expressed against a coparcenary between the putative father and his illegitimate son. It has of course been

8 (1917) I.L.R. 41 M. 44: 33 M.L.J. 224 (F.B.).
12 (1890) L.R. 17 I.A. 128: I.L.R. 18 C. 151 at 155 (P.C.).
22 (1919) I.L.R. 44 B. 185.

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strongly urged that Vijnaneswara himself expressly bases partition on a previous right and that a coparcenary cannot come into existence merely by a person's death. As stated above, the view which has been taken by the Courts of the position arising from this text is that the coparcenary does begin in this particular instance with the father's death and depends on it though in a partition before the putative father's death the illegitimate son share the separate estate of his father with his legitimate brothers and that it is the existence of the coparcenary which gives the subsequent right to partition between the legitimate and illegitimate sons and to a right of survivorship between them. The result may be illogical and an anomaly to the rest of the Hindu law but that is no reason to ask us to make a reference suggesting that all these decisions are incorrect and, as I pointed out above, the view contended for by the plaintiff would make a much more revolutionary change in the Hindu joint family as understood at least over the greater part of this Presidency by introducing females into the coparcenary. *Ram Saran Garain* v. *Tek Chand Garain*[21] also lays down emphatically that the illegitimate son of a Sudra does not occupy the same position as a son lawfully begotten and does not acquire at his birth a joint interest, with his father in the ancestral property.

I may finally deal with the argument that on account of the opinions expressed by certain modern commentators and judges sufficient doubt has been thrown upon the established law to justify a reference. Siromani, at page 408, of the old edition of 1885 is cited but it is to be noticed that when this edition was published, the decision in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanund Man Singh*[12] had not been given and that in the 2nd edition of 1893 at page 329 he says that the Privy Council decision clears up the difficulties by laying down that the father must be divided. Next West and Buhler (3rd edition, page 72) are cited. Here the heading appears to be in contradiction with the text below. The heading speaks of an undivided Sudra while the commentary says the passage in the Mitakshara can only refer to cases where the father is separated. I now come to the observations in *Meenakshi* v. *Muniandi Panikkan*,[19] *Soundararajan* v. *Arunachalam Chetty*[20] and *Subramania*

12 (1890) L.R. 17 I A. 128· I.L.R 18 C 151 (P C).
19 (1914) I.L.R. 38 M. 1144 at 1149· 27 M.L.J. 353.
20 (1915) I.L.R. 39 M. 136 at 152 and 153· 29 M.L J. 793 (F B).
21 (1900) I.L.R. 28 C 194.

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Aiyar v. *Rathnavelu Chetty*,[8] etc., which it is urged have thrown a doubt on the law as hitherto laid down. In *Meenakshi* v. *Muniandi Panikkan*[19] there is only a suggestion of Seshagiri Aiyar, J., that it is open to question whether having regard to the advancement of the class known as Sudras, the law, which owes its conception to the ideas prevalent when the twice-born classes were allowed to take Sudra women as wives, should still be allowed to prevail. In *Soundararajan* v. *Arunachalam Chetty*,[20] Sadasiva Aiyar, J., expresses the view that the son of a Sudra male born of a permanent female concubine of the Sudra caste is strictly speaking not an illegitimate but a legitimate (*aurasa*) son born of Gandharva marriage. But it has been pointed out to us for the appellant that Vijnaneswara, section 11, placitum 2 defines an *aurasa* son as one born of a legal wife (Dharmapatni) and that "Dharmapatni" never means a concubine. It has also been argued for the appellants that a Gandharva marriage is not a simple concubinage but an agreement of the parties to live together as husband and wife. There is no need to express any opinion on the latter point, but the text in Manu, Chap. III, verse 32, does not appear to me to support this view of a Gandharva marriage, for it says:

"The voluntary union of a maiden and her lover one must know (to be) the Gandharva rite, which springs from desire and has sexual intercourse for its purpose"

Coming to *Subramania Aiyar* v. *Rathnavelu Chetty*,[8] the same Judge in his order of reference remarks at page 53:

"That, in ancient Hindu Law, he (*i.e.*, a Sudra's illegitimate son) came in as one of the twelve classes of sons, there can, in my opinion, be no doubt."

This matter has been fully discussed above and I think at least it can be said that it is open to doubt whether a Sudra's illegitimate son comes into either of the list of Manu's twelve sons or the list of twelve sons of Yajnavalkya. At page 55, the same learned Judge expresses the opinion that an *aurasa* son corresponds to the English expression "son born of the loins" and that there are expressions in sacred writings which show that an illegitimate son can be called the *aurasa* son of the putative father. This opinion has been dealt with above. It may be noted that the question before the Court in that case was whether the father referred to in Chapter II was the natural father or the putative father. Next, we come to the remarks of

8 (1917) I.L.R. 41 M 44 at 62: 33 M.L.J. 224 (F.B.).
19. (1914) I.L.R. 38 M. 1144 at 1149: 27 M.L.J. 353.
20. (1915) I.L.R. 39 M. 136 at 152: 29 M.L.J. 793 (F.B.).

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Sir Kumaraswami Sastri, J., in *Subramania Aiyar* v. *Rathnavelu Chetty.*[8] The best commentary on this is the same learned Judge's remarks in a later case in *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb.*[21] The latter case was a question of the succession by an illegitimate son to his father's collaterals, and Sir Kumaraswami Sastri, J., states:

> Were the matter *res integra*, I am disposed to hold that, in the case of Sudras, an illegitimate son is in the same position as a legitimate son except that he gets a lesser share. The fact that an illegitimate son gets a lesser share would not by itself create a bar to collateral succession any more than the fact that an adopted son who exists along with a natural son born subsequently and who gets a lesser share would be barred. But there is a long catena of cases beginning with *Nistar Murtojah* v. *Kowar Dhunwunt Roy*, [(1863) Marshall's Reports, 609], which decide that an illegitimate son has no right to collateral succession I have in *Subramania Aiyar* v. *Rathnavelu Chetty*[8] referred to all the authorities and dealt fully with the illegitimate son's rights and the position of an illegitimate son with regard to collateral succession The right was negatived in . ."

and then he quotes eight cases and finally feels that the weight of authority must prevail. When this is the view of Sir Kumaraswami Sastri, J., himself, on the matter as to whether his opinions expressed in *Subramania Aiyar* v. *Rathnavelu Chetty*[8] threw so much doubt on the accepted law that we should make a reference, it is hardly necessary that we should differ from him. Two points may, however, be mentioned. On p. 65, he founds an argument on Balambhatta's view of the word "haret" हरेत् in the text. This has been dealt with above as pointed out, the very same word occurs in S. 7 referring to the widow. With regard to the argument that the illegitimate son had greater rights before, which were curtailed, there is a great deal in my opinion to be said for the opposite point of view which has been held by many learned Judges. Verse 163 of Manu in Chapter IX says:

> "The legitimate son of the body alone (shall be) the owner of the paternal estate; but, in order to avoid harshness, let him allow a maintenance to the rest"

That would appear to apply to all castes with the exception of the Sudra's illegitimate son and to make all other illegitimate sons entitled only to maintenance. In fact there seems to be no distinct text earlier than Yajnavalkya giving the illegitimate son a right to share with his legitimate brothers. On page 70 Sir Kumaraswami Sastri, J., says:

> "I am of opinion that the illegitimate son of a Sudra is one of the classes of sons recognized by Hindu Law and allowed to a Sudra *in addition to the twelve classes of sons enumerated as common to all the four castes*"

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8. (1917) I L R 41 M 44 at 62 · 33 M L J 224 (F.B).
21. (1925) I.L.R. 49 M. 116 at 154 49 M.L.J. 568

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Thus Sir Kumaraswami Sastri, J., holds that he does not fall within the twelve classes of sons and thereby negatives the view of Sadasiva Aiyar, J., quoted above. I am clearly of opinion that no sufficient cause has been made out for upsetting the long catena of decisions especially in a matter of succession and I agree with my learned brother in holding that no reference is necessary.

Turning now to the appeal, two legal points were raised, the first of which, whether an illegitimate son has a right to claim maintenance from property other than his father's property, though not given up, was not pressed as the matter is now before the Privy Council. The second legal contention was that the claim for maintenance cannot be brought in this suit as it was brought and refused in a prior suit, O.S. No. 35 of 1914, and is therefore barred under section 11, explanation 5, Civil Procedure Code. The present plaintiff's mother no doubt in that suit made the present plaintiff, plaintiff *eo nomine*. That plaint for maintenance was laid on the basis that the present plaintiff was entitled to a share in the family properties and the first relief asked for was as follows:—

> "To pass a decree directing the defendants to pay plaintiffs in advance in two instalments a year the sum due at the rate mentioned below for the maintenance, apparel and other expenses of the plaintiffs and of the said girls until the 2nd plaintiff attains majority and gets his share in the family properties or during the life-time of the plaintiffs, for the expenses of education, etc., of the 2nd plaintiff and for house-rent."

The Court gave the 2nd plaintiff maintenance until he attained majority. No reason was assigned in the judgment for granting him maintenance only until his majority and the matter was not put in issue or discussed. The decision on this matter was not appealed against and is perfectly clear why the plaintiffs in that case would not appeal against the order limiting maintenance to the minority of the 2nd plaintiff, because that would be entirely inconsistent with the case set up that the plaintiff was entitled to a share in the family properties. The learned Judge on this matter of *res judicata* in the present case says:

> "The plaint in the previous suit read as a whole makes it perfectly clear that the claim made therein by the plaintiff's mother on behalf and as the next friend of the plaintiff was only for the period of the plaintiff's minority and was not intended to relate to any subsequent period. This is made out by the fact that the first and primary relief asked for therein was to recover maintenance until the plaintiff should attain majority. No doubt it was prayed to be granted for life *in the alternative*, but this must obviously have been intended to *restrict* the first and primary prayer and not to *extend*

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it. In other words, the suit was for the maintenance of the plaintiff during his minority *or*, that is, if he did not continue to live during the whole of that period, for his life."

In spite of the objection that there was no need to mention anything about the 2nd plaintiff dying before he attained majority since his maintenance must automatically cease if he did so, it cannot, I think, be said that this is an absolutely impossible explanation. The 1st plaintiff, the mother in that suit, was entitled to ask for maintenance for herself during her life-time. There is no question that the learned Judge is correct in saying that the 2nd plaintiff's claim to maintenance was based on his owning a share in the estate and it would therefore naturally cease when he attained majority when he would either assert his right or sue for it. In the mofussil, plaints are often badly drafted and both my learned brother and myself are of opinion that it would be very hard to non-suit the plaintiff in the matter of maintenance owing to the unfortunate use of the plural "plaintiffs" in the plaint prayer. The plaint prayer no doubt should have run in some such way as this: "till the 2nd plaintiff attains majority and gets his share in the family properties for the expenses of education, etc., of the 2nd plaintiff and for house rent, and to the 1st plaintiff during her life-time," and I have no doubt that this is what was meant. I would therefore find for the plaintiff on this point. The learned Subordinate Judge's view at page 39, line 35—

"as the actual right to recover maintenance really accrues day by day, a suit for maintenance relating to a certain period cannot legally bar a subsequent suit for it in respect of a period subsequent both to the date of the first suit and the period for which maintenance was claimed therein"

would not appear to be correct. It is a change of circumstances which gives rise to a fresh cause of action as regards the amount of maintenance, but the claim for maintenance itself arises once and for all. In the present suit as the claim for maintenance is only an alternative to the claim for partition, it will be sustainable if we read the prayer for maintenance in the first suit in the light in which it was evidently intended and there is no bar by *res judicata*.

As regards the quantum of maintenance, the estate appears to consist of a thousand acres and the income appears to be about Rs. 43,000. It was no doubt held in *Gopalasami Chetti* v. *Arunachalam Chetti*[5] that

"in determining the rate of maintenance, an illegitimate member of a family who is not entitled to inherit can be allowed only a compassionate rate of maintenance,"

5. (1903) I.L.R. 27 M. 32 at 36.

though it was also said:

"In fixing, however, the compassionate rate of maintenance regard no doubt should be had to the interest of his deceased father in the joint family property and the position of his mother's family."

No authority is quoted for the view that the illegitimate son of a Sudra is entitled only to a compassionate rate of maintenance. Medhatithi in discussing the meaning of maintenance of illegitimate sons of *dasis* by Brahmins talks of "prajivanam" प्रजीवनं in his commentary on verse 179 of Manu which is as urged for the plaintiff-respondent, "more than jivanam" and denotes maintenance on a liberal scale (the prefix περι being the Greek Pi). In *Ananthaya* v. *Vishnu*[30] Muthuswami Aiyar and Best, JJ., state:

"The Smriti of Yajnavalkya awards maintenance to an illegitimate son not as provision against starvation and vagrancy, but in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes"

In *Muthusawmy Jagavera Yettappa Naicker* v. *Vencateswara Yettappa*[37] an illegitimate son was granted maintenance of Rs. 2,500 a year. In the present case, the plaintiff claimed Rs. 300 a month as maintenance. The Lower Court has granted him Rs. 110 with an allowance of Rs. 750 towards expenses of his marriage. The appellants claim that this rate is excessive and there is a cross-memorandum of objections that the rate asked for, Rs. 300, should have been granted. My learned brother and myself think that the rate granted by the Lower Court, which proceeds on the theory that the plaintiff is entitled only to a compassionate allowance, is too low and we would award a rate of Rs. 250. The expenses allowed for the marriage appear to be reasonable. With regard to arrears for the three years before suit which the plaintiff claimed, his circumstances and needs have naturally changed with his attaining majority and the rate allowed him in the previous suit, Rs. 20, which was for his minority, is not a guide. I think that as the defendants neither paid nor offered to pay him at this rate, but on the other hand denied his claim to maintenance altogether he can be granted arrears at the rate we have fixed. In regard to other item of maintenance I agree with my learned brother.

The appeal therefore fails and is dismissed with costs. The cross-memorandum of objections is allowed so far as the increase in the rate of maintenance from Rs. 110 to Rs. 250 with three years' arrears before date of suit is concerned, but in other respects it is dismissed. The parties will pay and receive pro-

30. (1893) I.L.R. 17 M. 160 at 161. 37. (1868) 12 M.I.A. 203.

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portionate costs on the memorandum of cross-objections including advocate's fee. I concur in the other order as to costs passed by my learned brother.

A.S.V. — *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD PHILLIMORE, LORD BLANESBURGH, LORD ATKIN, LORD SALVESEN AND SIR LANCELOT SANDERSON.

V. Seethayya and others .. *Appellants**

v.

P. Subramania Somayajulu and another .. *Respondents.*

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Inam grant—Estate conveyed under, melvaram *only or* kudivaram *also—Presumption—Construction of grant—Agraharam—Grant of, "as shrotriem" by* deshpandyas *to learned Brahmins not resident in the village—Grant of a "mouje"—Grant of* melvaram *only or of* kudivaram *also—Shrotriem grant—If may include* kudivaram*—Mouje—Meaning of—Evidence—Lost grant—Copy of, more than 30 years old, produced from proper custody, and bearing endorsement by deceased predecessor of party that it was a copy of the original—Admissibility in evidence of—Evidence Act—Sections* 21, 32, 90 *and* 65.

In a case in which the construction of a grant was in question, the respondents' case was that the original grant was lost. The appellants tendered in evidence a copy thereof, which was more than 30 years old, and was produced from proper custody, and which bore an endorsement by the then predecessors of the respondents that the document was a copy of the original.

Held, that the copy was secondary evidence of the terms of the original grant and was admissible as evidence of the terms of the lost original.

The document being over 30 years old, and having been produced from proper custody, the Court may, under S. 90 of the Evidence Act, presume the signatures authenticating the copy to be genuine. The statement to which the signatures are appended, *viz.*, that the document is a copy of the original, is evidence both as a statement made by a deceased person in a document relating to a relevant fact and also as an admission made by a party and a predecessor-in-title of the parties.

In regard to the question whether an inam grant does or does not comprise both the *varams,* there is no presumption either way, and each case must be decided on its own circumstances.

The question was whether an inam grant of an *agraharam,* made more than 250 years before and recognised by the British Government, was a grant of both the *varams* or was a grant of the *melvaram* only. The District Munsif held that it was a grant of the *melvaram* only, relying on four main points, *viz.*:—

(1) The grant purported to be a grant "of shrotriem" or "as shrotriem." The final recital in the document was as follows:—"As we have granted to you the said *agraharam* you should enjoy the same from son to grandson, paying the shrotriem thereon and be happy."

(2) The grant was of a *mouje.*

(3) The grantors were admittedly *deshpandyas* who were revenue officers or farmers of revenue under the paramount authority.

*P.C. Appeal No. 47 of 1925. 14th February, 1929.

(4) The Brahmins represented by the grantee were learned Brahmins apparently not resident in the village granted, but resident about two miles away.

The High Court held, on the other hand, that the document was equally consistent with a grant of both the *varams* The learned Judges did so, dealing with each of the points relied upon by the Munsif separately, and finding the point inconclusive as to each of them

Held, that the High Court's mode of treating the evidence was faulty, inasmuch as it ignored the weight which was obtained from the effect of the whole.

Held further, restoring the Munsif's judgment, that the grant was, on its true construction, a grant of the *melvaram* only.

A shrotriem grant may in fact grant the *kudivaram* as well as the *melvaram;* but the term shrotriem in the final recital in the grant can only mean revenue

The word *mouje* in the particular context does not mean merely a defined place View of Sadasiva Aiyar, J, in *Venkata Sastrulu* v. *Sitaramudu* (1914) I.L.R. 38 Mad 891 at 892 26 M.L.J. 585 that the phrase indicates "a village in which there were peasant proprietors owning cultivable lands even then" (at the time of the grant) approved.

Consolidated Appeal No. 47 of 1925 against the orders and a judgment, dated the 5th April, 1922, of the High Court of Judicature at Madras (Schwabe, C.J., Oldfield and Coutts-Trotter, JJ.), reversing the orders and the prevailing judgment, dated the 19th October, 1921, of Sir William Ayling, Officiating Chief Justice, of the same High Court, which affirmed the decrees and a judgment, dated the 1st March, 1918, of the Principal District Munsif of Tenali (N. Gopalakrishna Rao, B.A., B.L.).

The only question for consideration in the appeal to His Majesty in Council was whether the suit *agraharam* (village) was an "estate" within the meaning of the Madras Estates Land Act I of 1908, so as to oust the jurisdiction of the Civil Courts.

The material facts of the case are set out sufficiently and fully in their Lordships' judgment. The case in the High Court is reported in I.L.R. 46 M. 92 (F.B.).

The appeals against the Principal District Munsif's judgment were heard by Ayling, Offg. C.J. and Odgers, J., who delivered separate judgments on the 19th October, 1921. The learned Officiating Chief Justice held that Ex. I, a copy of the grant, was admissible in evidence; that upon the true construction of the grant the respondents thereby acquired only the *melvaram* interest in the village; that the said village was an estate under the Madras Estates Land Act, 1908, and that the Civil Court was, therefore, precluded from entertaining the suits. Mr. Justice Odgers, however, held that Ex. I was inadmissible in evidence; that in the absence of the grant the presumption laid down in *Muthu Goundan* v. *Perumal Iyen*[1] applied, and consequently

1. (1921) I.L.R. 44 M. 588: 40 M.L J. 429 (F.B.).

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the grantee here acquired both *melvaram* and *kudivaram* by their alleged grant of the inam of the said village; that the evidence on the record did not rebut the presumption; that the said village was not an estate under the said Act; and the Civil Court had jurisdiction to try the suits. The learned Judges having disagreed, the judgment of the learned Officiating Chief Justice prevailed under section 98 of the Civil Procedure Code, 1908, and the decision of the Principal District Munsif, dated the 1st March, 1918, was affirmed.

Against the judgment of Ayling, Offg. C.J., the respondents further appealed to the High Court under clause (15) of the Letters Patent. The appeals were heard by Schwabe, C.J., Oldfield and Coutts-Trotter, JJ. and the judgment of the Court was delivered by the learned Chief Justice on the 5th April, 1922. The learned Judges agreed with Ayling, Offg. C.J., that Ex. I was admissible in evidence, but they held that the grant was equally consistent with the grant of the revenue or of the land itself; that according to the Full Bench decision in *Muthu Goundan* v. *Perumal Iyen*[1] the grant was presumably of both *varams*; that the evidence on record did not negative that presumption; that the village was, therefore, not an "estate" under the Madras Estates Land Act, 1908, and the Civil Court had jurisdiction to entertain the suits. In the result, the learned Judges allowed the Letters Patent appeal.

De Gruyther, K.C. and *J. M. Parikh* for appellants.

Dunne, K.C. and *Narasimham* for respondents.

J. M. Parikh.—The decision of the Full Bench in *Muthu Goundan* v. *Perumal Iyen*[1] was considered by the Board in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi*[2] and is no longer the law.

[*Lord Phillimore*.—Did the Board say that *Muthu Goundan* v. *Perumal Iyen*[1] was not rightly decided?]

[*Lord Phillimore* refers to *Ponnusami Padayachi* v. *Karuppudayan*.[3]]

The definition of Shrotriem grant in Wilson's Glossary referred to.

Venkatanarasimha Naidu v. *Kotayya*[4] cited, showing the history of ryots and zemindars, their origin, etc.

[*Lord Phillimore*.—What is the meaning of "Sircar"?]

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1. (1921) I.L.R 44 M 588: 40 M.L.J. 429 (F.B.).
2. (1922) L.R. 49 I.A. 286: I.L.R. 45 M 586: 43 M.L.J. 640 (P.C.)
3. (1914) I.L.R. 38 M 843: 26 M.L.J. 285.
4. (1897) I.L.R. 20 M. 299: 7 M.L.J. 251.

Baden-Powell's Land System of British India, Vol. III, page 134 cited.

[*Lord Phillimore.*—That does not help you at all.]

Counsel then wanted to refer to the evidence, but Lord Salvesen doubted whether their Lordships could look into the evidence on a question of construction of the grant.

[*Lord Phillimore.*—Upon the construction of very ancient documents, you may admit evidence, which is not very recent or modern evidence, but ancient evidence. Only for that purpose we can look at the evidence. *Prima facie* we can look only at the grant and not at the evidence.]

Dunne, K. C. for respondents.—The copy of the grant was wrongly admitted as secondary evidence of the original.

[*Sir Lancelot Sanderson* refers to the Evidence Act, section 63.]

[*Lord Phillimore.*—If secondary evidence is at all admissible, any kind of secondary evidence will do.]

[*Sir Lancelot Sanderson* refers to sub-section (3) of section 63, Evidence Act, relating to copies made from or compared with the original.]

[*Lord Phillimore.*—The Act no doubt puts some limit upon the admissibility of *copies of copies.*]

[*Lord Salvesen.*—The copy must be made from the original.]

In the present case, the copy is not provable under sub-section (3) of section 63.

Counsel then discusses the question of the grant.

A Shrotriem is a grant made to a Brahmin. Fifth Report of the Select Committee on the East India Company's affairs, referred to, as to the status of *deshpandyas.* The document—Exhibit 1—is not merely a grant of revenue. It is a grant of the land. It is not a grant of *melvaram* alone. *See* Wilson's Glossary as to the meaning of the word Shrotriem.

14th Feb. 1929. Their Lordships' judgment was delivered by

LORD ATKIN.—This is a consolidated appeal from the judgment of the High Court at Madras given in eleven suits of ejectment brought by the respondents against the respective appellants. Seven out of the eleven suits were instituted in 1913, and the only question so far decided and the only question before the Board is whether the Civil Court in which the actions were brought had jurisdiction and not as the appellants contend the Revenue Courts. The determination of this question has required recourse on seven different occasions to the Courts and has

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occupied nine years in Madras. The case has taken six years more to reach the Board. Their Lordships deplore this delay, which was obviously much greater than was necessary, and reaches the borders of a scandal. They do not, however, propose to recapitulate the various stages in which the case toiled to and fro between the Lower Courts and the High Court, or to apportion blame; but will address themselves at once to the question of jurisdiction. This question arises under the Madras Estates Land Act, 1908. By section 189 of this Act exclusive jurisdiction is given to the Revenue Courts to entertain all suits set out in Schedule A, which includes a suit to eject a *ryot*. This, by reference to section 6, involves the question whether the *ryot* holds land in the "estate" of a landholder, and we are thus brought to the definition of estate, which by section 3 (*d*) means

"any village of which the land revenue alone has been granted in inam to a person not owning the *kudivaram* thereof, provided that the grant has been made or recognised by the British Government or any separated part of such village."

The present respondents claim under an inam grant made "about 250 years ago." The grant has been recognised by the British Government. In the course of these proceedings the respondents have admitted that they did not own the *kudivaram* before the grant, and that they did not acquire the *kudivaram* independently of and after the grant. The question of jurisdiction therefore depends upon whether the inam grant was of the "land revenue alone"; whether it granted the *melvaram* alone or also the *kudivaram*, *i.e.*, the land revenue alone or also the cultivator's share of the produce.

The principal question in the case is whether the terms of the original grant were proved, and, if so, what is the proper construction to be put upon them. The respondents' case was that the original grant was lost; its express terms were not proved; and that the proper inference from all the facts, including acts of ownership by themselves and their predecessors, was that under the grant they received the *kudivaram*. The appellants, on the other hand, said that the respondents had disclosed a copy of the original grant which the appellants tendered in evidence. They contended that the document in sufficiently plain terms gave the *melvaram* only. The respondents, while denying the admissibility of the copy, said that the grant on its true construction gave the *kudivaram* as well as the *melvaram*, or at any rate was so ambiguous as to admit extrinsic evidence leading to the same result. The document tendered was a Telugu document purporting to be a copy of two documents. The first was a document making a grant of the village in question

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to the predecessor of the plaintiffs for 6 pagodas, setting out the boundaries and signed by the grantors. The second was a Telugu translation of a Persian Dumbala, dated 1765 A.D., increasing the revenue to be paid by the holders from 6 to 25 pagodas. The document contains the endorsement "originals have been retained with us and copies have been filed 1858," signed by the then predecessors of the respondents, one of whom Ponnapalli Chinna Ramaswami was a plaintiff to some of the original suits now before the Board, but died at an advanced age during the proceedings. Their Lordships agree with the learned Chief Justice and his colleagues in the High Court that the document was admissible as evidence of the terms of the lost original. The document is over 30 years old and is produced from proper custody. By section 90 of the Evidence Act of 1872 the Court may therefore presume the signatures authenticating the copy to be genuine. The statement to which the signatures are appended, *viz.*, that the document is a copy of the original, appears to be evidence both for the reason given by the Chief Justice, *i.e.*, as a statement made by a deceased person in a document relating to a relevant fact, and also as an admission made by a party and a predecessor-in-title of the parties.

The document being admissible is secondary evidence of the terms of the original grant. The Court therefore must proceed upon the footing that the express terms of the original written grant are before it, and must proceed to construe them. Some confusion has been introduced into the case by conflicting decisions as to presumptions to be made in construing such a grant. The original District Munsif held that there was a presumption that such a grant did not give the *kudivaram*.

The High Court, relying on a decision of a Full Bench of the Court in *Muthu Goundan* v. *Perumal Iyen*[1] took the view that the presumption was that both the *melvaram* and *kudivaram* are included. It is, however, made clear by the subsequent decision of this Board in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi*[2] that there is no presumption either way, and that each case must be decided on its own circumstances. The document is in the following terms:—

Deed of gift executed and given on the 15th day of Adhika Chaitra Suddam of the year Parabhava, corresponding to 1610 of the Era of Salivahana, in favour of Ponnapalli Annappa Garu, who is eager in performing the six acts, *viz*. Yagna, Yajana, Adhyayana, Adhyapaka, Dana and Pratigraha by Puligadda Mallaparaju, Lakaraju, Perraju and Mazumdar Papanna, Rajas of Komaravole, and residents of Nizampatam.

1. (1921) I.L.R. 44 M 588. 40 M.L.J. 429 (F.B.)
2. (1922) L.R. 49 I.A. 286 at 303: I.L.R. 45 M. 586: 43 M.L.J. 640 (P.C.).

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As we have granted to you the Shrotriyam of Arepalli *agraharam* village, Nizampatam *taluk*, in the name of Siva on the occasion of the lunar eclipse, for 6 pagodas, you shall enjoy the same accordingly from son to grandson and shall live happily.

(The usual Sanskrit *sloka* omitted.)

Signatures of the Rajas:—

(Signed) Mallaparaju.
(Signed) Perraju.
(illegible).

Memorandum of the description of the boundaries for the *agraharam* executed and given on the 9th day of Chaitra Bahulam of the year Parabhava corresponding to 1610 of the Era of Salivahana in favour of Ponnapalli Annappa Garu who is eager in performing the six acts, *viz.*: Yagna, Yajana, Adhyayana, Adhyapaka, Dana and Pratigraha by Puligadda Mallaparaju, Lakaraju, Perraju, Mazumdar Papanna Garu, Rajas of Komaravole, residents of Nizampatam.

As we have granted to you Arepalli *agraharam* attached to Nizampatam, fixing a Shrotriyam of 6 pagodas thereon, particulars of the boundaries which have been shown in respect thereof are as follows:—

North-west.—Cherukumilli Ponnapalli village boundary lying to the north of the Kudali (meeting place) of Cherukumilli and Arumbaka—Pattugattu roughly.

North-east.—The village boundary of Nadimpalli and Rajavole.

East.—From the village boundary of the aforesaid Rajavole roughly through the middle portion and through the channel forming the village boundary of Dhulipudi, roughly Bagirevugunta.

South-east.—The Kudali (meeting place) of Nagaram and Dhulipudi.

South.—To the south of Chavutavalu, roughly Turukalaguntalu through the middle of Chittupaggala Katta and on the southern side of Vadanadum and through the middle of Peddaputtalu, the Kudali of Balusulapalem and Pudivada roughly.

South-west.—Jammulagunta boundary through the middle portion of Nallavada.

West.—Arumbaka through the *patu gatlu* of the said village and through the middle of the *vada* and through Kudali and through Chavata Dibbalu and through Daggulamadugu roughly.

As we have granted to you the said *agraharam*, you should enjoy the same from son to grandson paying the Shrotriyam thereon and be happy.

(Usual Sanskrit *sloka* omitted.)

Signatures of Rajas:—

(Signed) Mallaparaju.
(Signed) Papanna.
(illegible).

Seal

A copy of the Telugu translation written on the right-hand side of the Dumbala written in the Persian language.

Having fixed a Shrotriem of 25 pagodas (twenty-five pagodas) as fixed rent for next Fasli 1172 in respect of *mahmu* and *motarfa, libabu* and

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tobacco of Arepalli village, *sircar* Nizampatam, a cowle has been given by Nageshwara Dikshitulu, Somanna, Subbanna, Somayajulu and others (illegible) referred to in cowle for the coming Fasli 1172. Without allowing it to remain (illegible), rich *ryots* should be permanently selected to (illegible) satisfaction and cultivation should be carried on extensively and the produce should be tendered to the *sircar* in season.

30th Mahasulahali 1175.
Hizra.

Originals have been retained with us and copies have been filed. 1858 (torn)

(Signed) Ponnapalli Chinna Ramaswami
(Signed) Ponnapalli Suryanarayana Somayajulu.
(Signed) Lakshmipathi.

A copy of the Dumbala, a rough sketch of the village and a copy of the *kyfiat* of the villagers have been filed.

The learned Principal District Munsif of Tenali*, who decided that he had no jurisdiction, delivered a careful and able judgment with which, on the point of construction, their Lordships, except on the question of presumption, find themselves substantially in accord. He relied on four main points:—

(1) The grant purports to be a grant "of Shrotriem" or "as Shrotriem." Shrotriem, according to Wilson's Glossary, means "a grant of lands or a village held at favourable rate, properly an assignment of land or revenue to a Brahmin learned in the Vedas, but latterly applied to similar assignments to native servants of Government, Civil or Military, and both Hindus and Muhammadans, as a reward for past services. A Shrotriem grant gives no right over the lands and the grantee cannot interfere with the occupants as long as they pay the established rents." If the above definition were accepted in its full terms, the case would be concluded in favour of the appellants. But the learned Chief Justice in his judgment points out reasons for supposing that Mr. Wilson in the last sentence was purporting to give the effect of legal decisions which since his time have been questioned, and their Lordships are not prepared to differ from the view that a Shrotriem grant may in fact grant the *kudivaram* as well as the *melvaram*. But in this case the document itself in the final recital uses the term again:

"As we have granted to you the said *agraharam* you should enjoy the same from son to grandson, paying the Shrotriem thereon and be happy."

In this phrase the term can only mean revenue, and though their Lordships could not consider this consideration in itself conclusive, it points to the construction contended for by the appellants. It is not

[*N. Gopalakrishna Rao, B.A., B.L., now Subordinate Judge, Cocanada, East Godavari District.]

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without significance, though it is later than the document under construction, that the same use of the term is found in the translation of the Persian order "Having fixed a Shrotriem for 25 pagodas," etc.

(2) The grant was of a *mouja*. Their Lordships accept the view expressed by Sadasiva Aiyar, J., in *Venkata Sastrulu* v. *Sitaramudu,*[3] that the phrase indicates "a village in which there were peasant proprietors owning cultivable lands even then." Probably no more weight should be attached to this than may be borne by the circumstance that the village granted was presumably a revenue-producing village, some of the lands of which were already occupied. Their Lordships cannot accept the view favoured by the Chief Justice that the word in the particular context merely means a defined place.

(3) It is agreed that the grantors were *deshpandyas* who were revenue officers or farmers of revenue under the paramount authority. It is pointed out that this fact does not exclude the possibility of the grantors being themselves personally possessed of the land, *i.e.*, of the *kudivaram* rights. This no doubt is so, but the strong probability is that they granted that which in their position as *deshpandyas* they would possess, *viz.*, the rights over the revenue.

(4) The Brahmins represented by the grantee were learned Brahmins apparently not resident in the village granted, but resident about two miles away. This circumstance by itself is by no means conclusive. At the same time it appears to their Lordships to make it more probable that the grant was in the nature of an endowment of revenue rather than of land for the purposes of cultivation.

The learned Chief Justice deals with each of these points separately, and as to each of them finds the point inconclusive, and apart from the presumption upon which he relies, finds the document equally consistent with a grant of both *varams* as of the *melvaram* only. In their Lordships' opinion this is to ignore the weight which is obtained from the effect of the whole. Taking into account all the considerations mentioned, their Lordships are of opinion that they lead strongly to the conclusion that the grant was of the *melvaram* only, and they so construe the document.

In view of the admissions made for the purposes of these cases that the respondents did not acquire the *kudivaram* subsequently to the grant, it becomes unnecessary to consider the

3. (1914) I.L.R. 38 M. 891 at 892: 26 M.L.J. 585.

subsequent acts of the parties, and the inferences to be drawn from them. The document is unambiguous and the rights given by it must be determined by its words. It follows that the decree of the High Court on the Letters Patent Appeal, dated the 5th April, 1922, must be set aside, and the decree of the High Court, dated the 19th October, 1921, be restored. The appellants should have their costs of the Letters Patent Appeal and before this Board Their Lordships will humbly advise His Majesty accordingly.

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Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Douglas, Grant & Dold*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—VISCOUNT DUNEDIN, LORD CARSON AND SIR CHARLES SARGANT.

Jwaladutt R. Pillani .. *Appellant** (*Deft.*)

v.

Raja Bahadur Bansilal Motilal .. *Respondent* (*Plff.*).

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*Contract Act (IX of 1872)—Not a Code—S 264—Not exhaustive of conditions of liability of retiring partner to old customers of firm—Publication of retirement in newspapers—No actual notice to old customer—Liability of retiring partner in case of—Statute—Interpretation—*Stare decisis*—Applicability of rule of—Ambiguity in expression used*

Appellant was a partner of a firm which, along with another firm, granted in respect of a loan a promissory note in favour of the respondent, who was an old customer. Subsequenlty the firm dissolved partnership and the appellant retired. The firm continued to do business under the same name and by the deed of dissolution a certain interest in the business was secured to the appellant though he was no longer a partner. Thereafter, the old promissory note was cancelled and a new promissory note given by the two firms for the same sum, the rate of interest being, however, higher. The retirement of the appellant from the firm was advertised in the *Bombay Gazette* and in four other newspapers but no intimation was sent or conveyed in any way to the respondent.

Held, that the appellant was liable on the second promissory note.

The Indian Contract Act is not a Code, and, though S. 264 of that Act occurs in a fasciculus of sections devoted to partnership, the fasciculus is not exhaustive of all questions which can be raised in connection with partnership.

In view of the ambiguity of the expression used in the section, their Lordships observed that they would not be justified to give effect to a view of the section which would upset what had been considered by the commercial community as the law ever since 1882.

Appeal No. 154 of 1927 from a decree of the High Court of Bombay (Marten, C.J. and Blackwell, J.), dated the 29th

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*P.C. Appeal No 154 of 1927. 28th February, 1929.

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March 1927 affirming a decree of the said Court (Taleyarkhan, J.) on its Original Civil Jurisdiction, dated the 18th August, 1926, whereby the appellant was in effect held liable to pay to the respondent the sum of Rs. 2,33,000 and odd.

The suit in which the said decree was passed was brought by the respondent against (1) The Wadia Woollen Mills, Limited, and (2) the firm of Hooseinbhoy Pillani Wadia & Co. to recover a sum of Rs. 2 lacs and interest thereon due under a promissory note, dated the 3rd April, 1924 and signed by the said Company and firm. The said promissory note was executed in renewal of a previous note for the same principal sum, dated the 3rd April, 1923 and signed by the same parties.

The suit was defended only by the appellant, who, while admitting that he was a partner in the said firm of Hooseinbhoy Pillani Wadia & Co. at the date of the first note and therefore liable in respect thereof, pleaded that before the date of the renewed note he had retired from the said firm and had given public notice of his retirement and that therefore he was not liable to the respondent thereunder.

At the first hearing of the suit a decree was passed in favour of the respondent against the said company (which was then in liquidation) and the said firm reserving the question of the appellant's liability which was subsequently tried by a separate issue and decided by both Courts in favour of the respondent.

It was not disputed that the appellant did in fact retire from the said firm before the date of the renewed note, or that he gave notice of his retirement in the *Bombay Government Gazette* and various local newspapers, but the respondent was not aware thereof, and the appellant's name was in fact retained as part of the style of the said firm in which the renewed note was signed. The appellant attempted to prove that the respondent had express notice of his retirement, but this was negatived by the Trial Judge and his finding on this head was not challenged in appeal.

Mr. Justice Taleyarkhan (the Trial Judge), in the course of his judgment, observed as follows:—

"I must consider the next question whether the plaintiff must be deemed to have notice of the dissolution by reason of public notice having been given of the dissolution in the *Bombay Government Gazette* and other newspapers . . . . . The English Law requires that the old customers, who are known to the firm as having dealt with it, shall have actual notice, which is commonly given by circular. But, as regards persons who had not dealt with the firm (or, in other words, the general public), it is impossible in a large community to give specific notice; and therefore as

regards them, the most effectual public notice is all that can be required. In England notice published in the *London Gazette* is sufficient . . . . The question is whether section 264 of the Indian Contract Act was intended to simplify the English rule and abolish its distinction between old and new customers of the firm or whether it was intended to follow the rule of English Law. It was argued for the plaintiff that the provision contained in section 264 applied only to persons dealing with the firm after the date of dissolution, and that as to old customers the rule of English Law applied, and as no express notice of dissolution was given to plaintiff, Pillani was liable to the plaintiff. For Pillani, it was argued that though the Contract Act was not exhaustive and though every Chapter of the Act was not exhaustive, each section was exhaustive on the matters in respect of which it declared the law; that section 264, as indicated by the marginal note, dealt with 'notice of dissolution,' and that such being the case, there was no reason to suppose that the Legislature was dealing in section 264 with notice to new customers only . . . . I admit that there is considerable force in the argument on this point advanced by Mr. Mulla on behalf of Pillani and that the question is not one free from doubt and difficulty. I prefer, however, to follow the Calcutta rulings (*Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*, [(1882) I.L.R. 8 Cal. 678] and *Jagat Chandra Bhattacharjee* v. *Gunny Hajee Ahmed*, [(1925) I.L.R. 53 Cal. 214] and hold that no express notice of the retirement having been given to the plaintiff, Pillani is liable to him under the second promissory note, though the notice of dissolution was published in the *Bombay Government Gazette* and four local papers."

On appeal the learned Judges (Marten, C.J. and Blackwell, J.) concurred with Taleyarkhan, J., in his conclusions. They took the view that the section in question (S. 264, Contract Act) was not clear; in his judgment (in which Blackwell, J. concurred) the learned Chief Justice expressed the opinion that as they were dealing with a case on the Original Side a great deal of English common law and equity would be applicable and that under that law there was a distinction between old and new customers, and old customers were only affected by a dissolution of which they had actual notice, whereas new customers were affected by public notice; he pointed out that by a decision of the Calcutta High Court, *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*,[1] that Court had held, that if section 264 of the Contract Act had been intended to change the law the language used would have been more explicit. He then referred to the cases of dormant partners in which section 264 of the Contract Act had been held not to apply; and arrived at the conclusion that the section did not deal at all with cases where public notice had been given. The case in the Court of Appeal is fully reported in 29 Bom. L.R. 1244.

For facility of easy reference, section 36 of the English Partnership Act, 1890, which was referred to during the argument before the Privy Council, is reproduced below:—

1 (1882) I.L.R. 8 C. 678.

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Rights of persons dealing with firm against apparent members of firm.

36. (1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2) An advertisement in the *London Gazette* as to a firm whose principal place of business is in England or Wales, in the *Edinburgh Gazette* as to a firm whose principal place of business is in Scotland, and in the *Dublin Gazette* as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

Greene, K.C. and *Raikes* for appellant.

Upjohn, K.C., Lowndes, K.C., De Gruyther, K.C. and *H. Cassie Holden* for respondent.

Greene, K.C.—The question turns on the true construction of section 264, Contract Act. The appellant was a partner in the firm and retired by a deed of dissolution, dated the 12th September, 1923. Previous to that date, the promissory note of Rs. 2 lacs was executed in respondent's favour. It is a joint and several promissory note. The appellant advertised the dissolution in the *Bombay Government Gazette* and several other newspapers circulating in Bombay. The question is, whether he is liable on the promissory note executed after his retirement, although public notice of the dissolution had been given. In England a distinction is made between old and new customers. The question arises, if that is the law under section 264. No doubt the Contract Act is not exhaustive, but the law of partnership is dealt with exhaustively in sections 239 to 266. See the Preamble of the Act and section 1. The judgment in *Mohori Bibee* v. *Dharmodas Ghose*[2] decides that the Contract Act, so far as it goes, is exhaustive.

[*Viscount Dunedin.*—If this were a case arising under the English Law, do you admit you would be liable?]

Yes; I admit that.

See *Ramdas Vithaldas Durbar* v. *Amerchand & Co.*[3] which lays down that the Contract Act is an amending as well as a consolidating Act; and that you must not approach the question with any prejudice that the Indian Legislature can never be in front of English Law as regards amendment.

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2. (1903) L.R. 30 I.A. 114: I.L.R. 30 C. 539 (P.C.).
3. (1916) L.R. 43 I.A. 164: I.L.R. 40 B 630: 31 M L.J 541 (P C).

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Lord Macnaghten points out in *Norendra Nath Sarcar* v. *Kamalbasini Dasi*[4] the proper mode of dealing with an Act intended to codify a particular branch of the law, and quotes with approval Lord Herschell's judgment in the well-known *Bank of England* v. *Vagliano*[5] case. The Court must approach the question uninfluenced by any consideration of the previous state of the law.

Section 264 only deals with cases where no public notice is given. In the present case, public notice was given. It would be very curious indeed that, when public notice is given, the appellant could still be made liable, by resorting to the previous state of the law. The section applies both to old and new customers, that is, to persons who had dealings with the firm before and after dissolution.

[*Viscount Dunedin.*—The word "persons" in the section necessarily includes both.]

There is a solitary judgment of Beaman, J., to the contrary, in *Gorio* v. *Vallabhdas*[6].

[*Viscount Dunedin.*—Ordinarily, apart from considerations of any religious laws and the like, English Law applies in India.]

Upjohn, K.C.—In the Charters of the High Courts, English Law is expressly referred to.

[*Sir Charles Sargant.*—Members of the firm are only bound because a partner is the presumed agent of the firm.]

[*Viscount Dunedin.*—When you cannot find anything in the Hindu and Muhammadan Law, you necessarily have recourse to the English Law.]

Upjohn, K.C.—In the same year that the Contract Act was passed, 1872, the Evidence Act was enacted, in which section 115 crystallizes the English doctrine of estoppel.

[*Sir Charles Sargant* refers to the Preamble of the Contract Act, "To amend certain parts of the law relating to contracts."]

[*Viscount Dunedin.*—You have got to find the construction of the section first, before you go further into English Law.]

I submit that the section should be read in the following manner:—

4. (1896) L.R. 23 I.A. 18: I.L.R. 23 C. 563: 6 M.L.J. 71 (P.C.).
5. (1891) A.C. 107.
6. (1915) 17 Bom. L.R. 762.

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First.—If no public notice of a dissolution is given, persons dealing with a firm will not be affected by such dissolution unless they themselves had notice thereof.

That is the exact equivalent of the section.

Second.—Persons dealing with a firm will not be affected by the dissolution—

(*a*) if no public notice of such dissolution has been given;

(*b*) if they themselves have no actual knowledge of such dissolution.

Third.—Persons dealing with a firm are not to be affected by a dissolution—

(*a*) of which no public notice has been given;

(*b*) of which they themselves have no actual notice.

Fourth.—Persons dealing with a firm will not be affected by the dissolution of which they themselves had no actual notice, unless public notice of such dissolution is given.

The section therefore means that persons dealing with a firm will be affected by a dissolution, of which public notice is given. The section deals both with old and new customers. There is nothing in the section to show that it is confined to new customers.

[*Lord Carson.*—For old customers, you have to give express notice in this country.]

In *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*[1] the learned Chief Justice relies on section 208 of the Contract Act, which deals with agency, not partnership. He refers to the English Law and says that section 264 is not exhaustive, and passes on to another part of the Act, section 208, which does not deal with partnership at all. Section 264 specially deals with partnership, and it is not legitimate to look at the sections on Agency.

[*Sir Charles Sargant.*—Has *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*[1] been followed in India?]

Yes, only in one case, *Ezekiel Moses* v. *Russa Engineering Works*,[7] a single Judge decision. It was also referred to in *Jagat Chandra Bhattacharjee* v. *Gunny Hajee Ahmed*,[8] but the present question did not really arise for decision, as there was no notice of any kind, public or otherwise, given in that case. But the question there was, whether the section applied to new and old customers, and the learned Judges decided that it applied

1. (1882) I.L.R. 8 C. 678.
7. (1923) I.L.R. 1 Rang. 47.
8. (1925) I.L.R. 53 C. 214

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to both. Reads from page 227 of the report the paragraph beginning "In the first place the section says. . . ."

In re Hodgson[9] and *Scarf* v. *Jardine*[10] referred to.

The learned Chief Justice in this case does not tackle the question of construction at all. He merely says that the section is not entirely exhaustive, because it does not admittedly apply to dormant partners. I submit that is not the right method of approaching the question. On any construction, the effect of "public notice" is left at large.

[*Sir Charles Sargant* refers to section 36 of the English Partnership Act, 1890, and enquires if there is any corresponding provision in the Indian Contract Act which touches the matters dealt with in section 36.]

Upjohn, K.C.—Yes; section 261, Contract Act, refers to a partner dying.

[*Sir Charles Sargant.*—There are still several gaps in the Contract Act. For instance, sub-section (3) of section 36 of the Partnership Act deals with the retirement of an active partner and his liability to a person who did not know him to be a partner. That case is not expressly dealt with in the Indian Contract Act.]

Section 264 deals with the precise case your Lordship has put.

[*Viscount Dunedin.*—In section 264 the question is, whether you can extract a positive from a negative.]

[*Viscount Dunedin.*—In every Code, something crops up which is not provided for, but it does not necessarily follow that the Code is not exhaustive.]

Upjohn, K.C., for respondent.—Section 264 deals with the effect of dissolution on the liability of a partner.

Norendra Nath Sarcar's case[4] says that you must first examine the language of the Statute. We must therefore look at the language of section 264.

[*Sir Charles Sargant.*—The Preamble speaks of amending certain parts of the law relating to contracts, partnership being one of them.]

It would open the door to all kinds of frauds if you hold that once public notice is given, all persons dealing with the firm are affected by the dissolution.

[*Viscount Dunedin* refers to the word "known" in sub-section (3) of section 36 of the English Partnership Act.]

4. (1896) L.R. 23 I.A. 18: I.L.R. 23 C. 563: 6 M.L.J. 71 (P.C.).
9. (1885) 31 Ch. D. 177.
10. (1882) 7 A.C. 345.

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[*Lord Carson.*—In this case, the appellant was an *apparent* member of the firm, holding himself out as a partner.]

[*Viscount Dunedin.*—See sub-section (1) of section 36, Partnership Act.]

"Apparent" in sub-section (1) of section 36 means "actual partners" as well as partners liable under the doctrine of holding out, as distinguished from dormant partners. "Apparent" in sub-section (1) would exclude a dormant partner.

Section 264 of the Contract Act is not exhaustive, as it admittedly does not deal with dormant partners. The section is up against the doctrine of estoppel as laid down in section 115 of the Evidence Act and section 208 of the Contract Act.

[*Viscount Dunedin.*—The Board is very reluctant to disturb the law as understood in India for a long time.]

The decision of Garth, C.J., was given in 1882 and has been the law now for 50 years. In 1886 the Legislature amended the very next section, (265), relating to partnership, and though they must have been aware of the decision of Garth, C.J., given in 1882, they left section 264 alone and did not in any way interfere with it. The judgment of Sir Richard Garth has been the law in commercial transactions in India for 50 years. The learned Chief Justice was quite right in relying on the Agency section (208). The whole law of partnership is a branch of the law of Agency and nothing else.

[*Lord Carson.*—Both sections 208 and 264 require that there must be notice.]

Sections 245 and 246 of the Contract Act also support our contention. We have proved a case any way under section 246 Pillani (appellant) was a member of the firm, to whom the plaintiff gave credit, and sections 245 and 246 become applicable.

The argument of my learned friend, Mr. Greene, would be contrary to section 208. There is a very excellent illustration attached to that section. The implication sought to be made in section 264 would be contrary to the principle of that section.

See *Trueman* v. *Loder*,[11] (an Agency case), which is an apt illustration under section 208.

A public notice in newspapers which does not come to the knowledge of persons who previously dealt with the firm would not be sufficient. It would not be notice of revocation of authority. The decision in *Trueman's case*[11] shows that

11. (1840) 11 A. & E. 589: 113 E.R. 539.

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a mere public notice is ineffectual as against persons who had dealt with an agent. The same principle would apply to partnership, which is merely a branch of the law of Agency.

The appellant's learned counsel asks your Lordship to make the implication under section 264 that persons dealing with a firm are not affected by a dissolution of which no public notice is given, but are affected when public notice is given. This implication is not justifiable.

Mr. Greene argued that sections 239 to 266 were exhaustive as a Code of the law of partnership. But a section dealing exhaustively with retirement would provide for dormant partners, while it is admitted that section 264 does not deal with dormant partners at all. See section 1 of the Act, specially the words "Nothing herein contained shall affect. . . ."

[*Viscount Dunedin.*—It is elementary law, and also a good working system, that retirement of a partner is ineffectual, in England, unless brought to the notice of the person interested.]

[*Lord Carson.*—The provision as regards notice of retirement is clearly well known to all people in commercial circles.]

Mr. Greene's argument was that persons dealing with a firm will be affected by public notice, and he says that the section makes no distinction between old and new customers. But we submit that, by a mere inference, the Legislature could not be deemed to have taken away the right which is specially conferred by English Law and also by section 246 of the Contract Act. You cannot by a side-wind and a mere inference introduce such a far-reaching change in the law. Sir Richard Garth, a Judge of very great authority, decided the question in *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*[1] ten years after the passing of the Contract Act, and his decision has never since been doubted. It is now looked upon as a well-settled and well-established rule in the commercial community in India.

Lowndes, K.C., follows. See *Irrawaddy Flotilla Co.* v. *Bugwandas*[12] for the proposition that the principles of the English Common Law are applicable.

[*Lord Carson.*—That case shows that common carriers were outside the Contract Act.]

I rely on the decision in *Shewram* v. *Rohomut-toollah*.[13] It clearly shows that the English Common Law applied before the Contract Act was enacted.

1. (1882) I.L.R. 8 C. 678
12. (1891) L.R. 18 I.A. 121: I.L.R. 18 C. 620 (P C.).
13. (1864) W.R. Supp. 94.

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Greene, K.C., in reply.—See the following passage in Mulla and Pollock's commentary on section 264 of the Contract Act: "This section looks, on the face of it, as if it had been intended to simplify the English rule and abolish its distinction between old and new customers of the firm; but authoritative interpretation, so far as it has gone, is otherwise." Respondent's counsel is not right in saying that the decision of Garth, C.J., in *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*[1] has been universally accepted as good law.

28th Feb. 1929. Their Lordships' judgment was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—The facts in this case are not in dispute. The appellant Pillani was a partner of a firm of Husseinbhai Pillani Wadia & Co. On the 3rd April, 1923, that firm along with Wadia Woollen Mills, Limited, granted in respect of a loan a promissory note for 2 lacs of rupees with interest at 7½ per cent. in favour of the respondent Raja Bahadur Bansilal Motilal. On the 12th September, 1923, the firm dissolved partnership and the appellant retired. The firm continued to do business under the same name and by the deed of dissolution a certain interest in the business was secured to the appellant though he was no longer a partner.

On the 3rd April, 1924, the old promissory note was cancelled and a new promissory note given by the company and the firm for the same sum of 2 lacs, interest on this note running at 8¼ per cent. It is admitted that the retirement of the appellant from the firm was advertised in the *Bombay Gazette* and in four other newspapers, and it was found by the Trial Judge and has not since been questioned that no intimation was sent or conveyed in anyway to the respondent. The sole question is whether the appellant is liable on the second promissory note. He has been so found by the Judge of first instance and by the Court of Appeal. There can be no question that the plaintiff, being an old customer and no notice having been given to him of the dissolution of the partnership and the retirement of the appellant, the appellant is by English Law liable. It would be otiose to quote authority for this, and this was undoubtedly the law of India, at least prior to the Contract Act of 1872: *Sheoram* v. *Rohomutoollah*.[1a] The defence of the appellant is based on the terms of section 264 of the Indian Contract Act of 1872, which is as follows:

"Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given unless they themselves had notice of such dissolution."

1. (1882) I.L.R. 8 C. 678. 1a (1864) W. R Supp. 94.

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The appellant argues that "persons" includes both old and new customers, and that though the section is expressed in a negative form there must be extracted therefrom the positive proposition that persons will be affected by a dissolution of which public notice has been given. Against that it is urged that the section is merely negative and must be strictly limited to what it says, which is the effect of the dissolution of the firm on the rights of persons dealing with it, but not on the liabilities of the firm to the persons so dealing.

Their Lordships feel that if this were a new statute which was to be construed for the first time, there would be great force in the appellant's argument. But the matter cannot be so approached. As long ago as 1882 the very question was raised before the High Court of Calcutta in the case of *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee*,[1] and Garth, C.J., pronounced a judgment contrary to the contention of the appellant. He was chiefly swayed by the consideration that if it was intended to make such a far-reaching change on what had been the law of England introduced into the law of India, and which was still the law of England, the enactment would have been expressed in clear and positive words and not left to be gathered by inference from a negative proposition. That judgment has been followed in subsequent cases, and has ruled the law and contracts in India ever since. To the view of Garth, C.J., their Lordships would add two further considerations. The law as laid down in England has been all along found a workable law in a country where there is far more commercial experience than in India, and it remained unaltered in England when the whole subject was reviewed in the Partnership Act of 1890. Also the Indian Contract Act is not a code. The preamble so states "Whereas it is expedient to define and amend certain parts of the law relating to contracts"; and Lord Macnaghten in the case of *Irrawaddy Flotilla Company* v. *Bugwandas*[12] says (p. 129):

> "The Act of 1872 does not profess to be a complete code dealing with the law relating to contracts It purports to do no more than to define and amend certain parts of that law No doubt it treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts"

And although the section does occur in a fasciculus of sections devoted to partnership, it is clear that the fasciculus is not

1. (1882) I.L.R. 8 C. 678.
12. (1891) L.R. 18 I.A. 121: I.L.R. 18 C. 620 (P.C.).

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exhaustive of all questions which can be raised in connection with partnership.

Taking into account all these considerations their Lordships do not think they would be justified, in view of the ambiguity of the expression used, to give effect to a view which would upset what has been considered by the commercial community as the law for such a long period. They will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellant: *Lattey & Dawe.*

Solicitors for respondent: *T. L. Wilson & Co.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—VISCOUNT DUNEDIN, LORD CARSON AND SIR CHARLES SARGANT.

P. C.

Vallabhdas Naranji v. The Collector.

Vallabhdas Naranji, Khot of Kanjur .. *Appellant**

v.

The Collector under Act I of 1894. .. *Respondent.*

Land Acquisition Act (I of 1894), Ss. 23, 24—Value of land which is absolutely worthless in itself but which has a potentiality of being used for salt works—Waste land—Valuation as, when justified

In determining, under Ss. 23 and 24 of the Land Acquisition Act, the value of land, which is absolutely worthless in itself but which has a potentiality of being used for salt works, the owner is entitled to the market value of that potentiality, but it is the present market value of that potentiality.

Where, therefore, it was found by the High Court that in order to establish salt works it was necessary to lay out a large sum of money and to do a great deal of construction, and that in one case some people had spent 7 lakhs of rupees on salt works and had not made them pay at all, *held,* that the High Court was right in drawing the inference that it would not pay anybody to pay for land of that sort, even if they were going to construct salt works upon it, more than the value as waste land.

Consolidated Appeal No. 142 of 1927 against the decrees of the High Court, Bombay (MacLeod, C.J. and Madgavkar, J.), dated the 21st September, 1925, which reversed the decisions of the Assistant Judge of Thana, dated 27th April, 1923, and made on References No. 17 of 1919 and No. 22 of 1921, under the Land Acquisition Act (I of 1894), section 18.

On the 27th December, 1917, Government notified under section 6 of the above Act a declaration that part of the land in question in the present appeal was needed for a public purpose, and on the 7th January, 1920, a like declaration was notified with regard to the rest of the said land. The only

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*P.C. Appeal No. 142 of 1927. 11th February, 1929.

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question on the appeal to His Majesty in Council was as to the valuation of the land.

The appellant is the Khot of an alienated village called Kanjur, holding under a kowle or lease from Government at a fixed rent. The land in question, the total area of which has been found to be about 197 acres, is salt marsh, described as "khajan." With the exception of a small portion, which, however, was uncultivated and waste, the whole area is flooded at high tide and can be used only for the purpose of salt pans. Adjoining the said lands lies an area of 1,300 acres situated in the villages of Bhandup and Kanjur which was acquired in 1906 by Government with the object of letting it out for the purpose of the manufacture of salt. In 1917 Government required further land for the like purpose and accordingly issued the notification, dated the 27th December, above referred to. A small portion of land having been omitted by an oversight, the second of the notifications above referred to was made on the 7th January, 1920.

The Collector, acting under the Land Acquisition Act, section 11, valued the land at Rs. 14 per acre and awarded to the present appellant the sum of Rs. 2,920. The appellant, who claimed compensation at the rate of Rs. 3,000 per acre, required that the matter should be referred under section 18 of the Act for the determination of the Court.

The matter came before the District Court of Thana, and evidence having been given on the one side and the other, the Assistant Judge of Thana on the 27th April, 1923, delivered a voluminous judgment and assessed the value of the land at Rs. 200 per acre, observing:

"I think that, considering the prospects—neither immediate nor remote—of the lands in question being turned into salt works at the time of the acquisition, independently of the Government project, Rs. 200 per acre would be a fair valuation."

The appellant had never attempted to use the land for this purpose, nor had he ever received an offer from any other person to purchase or rent the land from him for salt works. But the learned Judge was of opinion that by reason of its vicinity to the Government salt lands above referred to, it had automatically acquired a potential value for this purpose, which he assessed at Rs. 200 per acre.

The evidence with regard to the Government salt lands was that though they had been acquired for this particular purpose in 1906 no tenants could be found for them till 1917, when it would appear that owing to the War there was an urgent need

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for salt; that the tenants who then came forward to take them had been put to very heavy capital expenditure and had been unable to make any profit from their venture.

Against these decisions of the Assistant Judge, cross-appeals were preferred to the High Court; those of the Khot (the present appellant) were appeals Nos. 211 and 212 of 1923, and those of the Collector were appeals Nos. 252 and 255 of 1923. These appeals came on for hearing before Sir Norman MacLeod, Chief Justice, and Mr. Justice Madgavkar, who on the 21st September, 1925, delivered their judgment thereon and in pursuance thereof they made decrees dismissing the appeals of the present appellant and on the cross-appeals restoring the award of the Collector mentioned above. In the High Court the present appellant reduced his said claim from Rs. 3,000 to Rs. 300 an acre.

The learned Judges in the course of their judgment said:

"The real question is what would those lands have realized if they had been put up in the market in December, 1917, for sale by private agreement or by auction, and that apparently is the point to which neither the witness nor the Judge has paid attention. It is not suggested that there are any instances of sale of similar land in the neighbourhood because nobody would be likely to want to purchase such land. Consequently, the Court is thrown back on guessing what would be a fair compensation to the owner for depriving him of his land. It has been suggested that there would have been persons willing to come forward in December, 1917, to buy this land, because Government had obtained leases for the land to the east. But because the Government had been able to secure certain persons who were prepared to spend money in constructing salt pans on Government land, it would not follow by any means that other persons would be willing to come forward to purchase the land in reference at a high value in order to construct salt pans, because it has not been shown in any way that that would have attracted an investor. Persons who leased the lands to the east from Government on the terms mentioned in the lease apparently made no profit out of the transactions; in fact, they lost considerably. But there is nothing to show that they would have gone in for the enterprise of manufacturing salt if they had to pay, before they began constructing the salt pans, a high value for the land itself. Calculations with regard to the value of the claimant's lands are mere speculations, and if these lands had been put up for sale in the market in 1917 it is very doubtful whether they would have attracted a single purchaser. The claimants would be entitled to a nominal value as compensation for what was undoubtedly worthless land. We do not think that Rs. 14 an acre awarded by the Collector was an unreasonable amount."

Upjohn, K.C. and *Raikes* for appellant.

Lowndes, K.C. and *K. Brown* for respondent.

Upjohn, K.C.—There is no different rule in England and India as to ascertaining the market value of land: section 23 of the Land Acquisition Act referred to.

[*Lord Carson.*—In determining compensation payable by the Government, you take the market value into consideration.]

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The various matters mentioned in section 23 are not exhaustive.

[*Viscount Dunedin.*—When you come to section 23, it is always the market value. The principal question always is, what is the market value. The other things mentioned in the section are subsidiary.]

[*Lord Carson.*—We cannot give the go-bye to the market value. That is the basis of compensation in all cases.]

Cedars Rapids Manufacturing and Power Co. v. *Lacoste*[1] shows that the Court must assess the market value of the land with all its advantages.

[*Lord Carson* refers to page 576 of the report in that case where it says: "The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined." It is the present advantage *to the owner.*]

[*Viscount Dunedin.*—If you substitute "waste value" for "agricultural value" in the passage beginning "Where, therefore, the element of value. . . ." at page 576 of the report in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*,[1] the paragraph becomes applicable to the present case. It must be an imaginary value if the land were put up for sale.]

[*Viscount Dunedin.*—There is no doubt that the land has potentialities for salt works, but in order to create salt works, you have got to spend a considerable amount of money, and what the High Court say is that it would not pay a man to incur all this expenditure.]

[*Lord Carson.*—You have to spend an enormous sum and even then the scheme may not pay at all.]

[*Sir Charles Sargant.*—You are not entitled to more than the potentialities reflected in the present market value. The potentiality is always reflected in the present market value.]

I submit that the learned Judges of the High Court were not justified in treating it as worthless land. The Trial Judge saw all the witnesses and gave his decision, with cogent reasons for his conclusions; he had, besides, local knowledge of the value. The High Court were not entitled to reverse his judgment.

Counsel for the respondents were not called upon.

11th Feb. 1929. Their Lordships' judgment was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—This is an appeal against a judgment of the High Court of Bombay upon a land acquisition

1 (1914) A.C. 569.

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case by which they have given as compensation a certain figure of 14 rupees per acre, having set aside the judgment of the Assistant Judge of Thana, who had given a larger sum of 200 rupees per acre.

The land in question is an irregularly shaped piece by the sea, which is covered by the tide at various times, and which for what might be called ordinary purposes is practically useless. Land near the sea, however, has the capability that if salt works are constructed upon it it is possible to get the salt and thus establish a business. The learned Judges in the High Court say:—

"The real question is what would these lands have realised if they had been put up in the market in December, 1917, for sale by private agreement or by auction, and that apparently is a point to which neither the witness nor the Judge has paid attention. It is not suggested that there are any instances of sale of similar land in the neighbourhood, because nobody would be likely to want to purchase such land. Consequently the Court is thrown back on guessing what would be fair compensation to the owner for depriving him of his land"

The learned counsel for the appellant took umbrage at that sentence, but their Lordships do not think that there is really anything to be found fault with in it. They are of course bound by the terms of the Land Acquisition Act, which deals, in Ss. 23 and 24, with the considerations that are to be taken into account in determining the value of land. Practically the statutory conditions are just what has been laid down as the law in this country. It would be useless to refer to many cases, but one case which has been quoted was the *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste and others*[1] which really followed a case of *In re Lucas and Chesterfield Gas and Water Board*,[2] in which there was an able judgment of Lord Moulton. What it really comes to is this: This land is absolutely worthless in itself, but it has no doubt a potentiality of being used for salt works, and therefore the owner is entitled to the market value of that potentiality, but it is the present market value of that potentiality. What is found is that in order to establish salt works it is necessary to lay out a large sum of money; it is not merely a question of taking the land and then finding that you have salt works; it is necessary to do a great deal of construction. It was proved that in one case some people had spent 7 lakhs of rupees on salt works and had not made them pay at all; but hoped that at the end of 10 years they possibly would pay. That is not what one would call very encouraging.

1. (1914) A.C. 569. 2. (1909) 1 K.B. 16

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The result is this: The learned Judges of the High Court have drawn the inference which their Lordships think is a correct one, that it would not pay anybody to pay for land of this sort, even if they were going to construct salt works upon it, more than the value as waste land. No doubt in arriving at the value of waste land, there being no sales to guide one, it is more or less guess-work. The learned Judges in the High Court have guessed it at 14 rupees, which was the figure taken by the Collector, and in their Lordships' opinion they are in no better position to make a guess, and they will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Ranken, Ford & Chester.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Vemulapalli Ramakotayya ... *Appellant* (Plaintiff)*

v.

Gutha Viraraghavayya .. *Respondent (2nd Defendant).*

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Ramakotayya v. Viraraghavayya.

Hindu Law—Widow—Alienation without necessity—Consent by the next presumptive male reversioner for no consideration—Alienation whether binding on him when he succeeds to the estate.

Where an alienation without necessity by a Hindu widow of property forming part of her deceased husband's estate is consented to by the next presumptive male reversioner who, however, receives no consideration for giving such consent, the transaction is binding on the consenting reversioner, if he succeeds to the estate after the death of the widow and of the female reversioner succeeding her.

Fateh Singh v *Thakur Rukmini Ramanji Maharaj,* (1923) I.L.R. 45 All. 339 (F B) and *Akkawa* v. *Sayadkhan Mithekhan,* (1927) I.L R 51 Bom 475 (F.B.) followed

Rangasami Goundan v. *Nachiappa Goundan,* (1918) L.R. 46 I.A 72: I.L R. 42 Mad. 523; 36 M L J 493 (P.C) explained

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Ramesam, in S.A. No.

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*L P.A. No. 93 of 1926. 1st November, 1928.

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814 of 1923, preferred against the decree of the District Court of Guntur in A.S. No. 92 of 1922, preferred against the decree of the Court of the District Munsif of Repalle at Tenali in O.S. No. 147 of 1919.

V. Govindarajachari for appellant.

Ch. Raghava Rao for respondent.

The Court (The Chief Justice and Madhavan Nair, J.) referred the following question to a Full Bench for its opinion:

"Where an alienation without necessity (Exhibit I) by a Hindu widow of property forming part of her deceased husband's estate is consented to by the next presumptive male reversioner who, however, receives no consideration for giving such consent, is the transaction binding on the consenting reversioner, if he succeeds to the estate after the death of the widow and of the female reversioner succeeding her?"

The Court expressed the following

Coutts Trotter, C. J.

OPINION. *The Chief Justice.*—The facts necessary for the determination of this reference are briefly these:—

Vemulapalli Subbayya died in 1909, leaving a widow Seethamma, the 1st defendant and his mother Bapamma, the 3rd defendant surviving him. On the 2nd of October, 1918, Seethamma executed a deed of gift in respect of some of the properties that came to her from her husband in favour of her own brother Veeraraghavayya who is impleaded as the 2nd defendant in this case. The gift was effected by means of a document which is filed as Exhibit I in the case, and on the 19th of October the plaintiff executed a document filed as Exhibit II which in effect is a complete relinquishment of all of his rights as prospective reversioner and also purports to give full consent to the transaction evidenced by Exhibit I, to which document indeed he was an attesting witness. The question is whether by reason of his action in these matters he is to be held to be precluded from challenging the transaction. The exact wording of the question is as follows:—

"Where an alienation without necessity (Exhibit I) by a Hindu widow of property forming part of her deceased husband's estate is consented to by the next presumptive male reversioner who, however, receives no consideration for giving such consent, is the transaction binding on the consenting reversioner, if he succeeds to the estate after the death of the widow and of the female reversioner succeeding her?"

There is a Full Bench decision of the Allahabad Court, *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj*,[1] which is directly in favour of the respondent here, and that in its turn was followed by a Full Bench of the Bombay Court, *Akkawa*

1. (1923) I L R 45 A 339 (F B.).

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v. *Sayadkhan Mithekhan.*[2] In substance the argument before us is that these cases are inconsistent with the Privy Council decision in the Goundan's case, *Rangasami Goundan* v. *Nachiappa Goundan*[3].

The learned Judge who decided the Second Appeal, Ramesam, J., speaks in his judgment of the plaintiff, the prospective reversioner being estopped. In our opinion no question of estoppel arises in this case at all, for the essence of the doctrine of estoppel is that a person who acts on a representation of fact made to him by another person and is thereby damnified, is entitled to say that the person who made that representation cannot be heard to contest the truth of the facts which he himself asserted. The essence of the doctrine is that the person who acted on the faith of the assertion was damnified by so acting, and that feature is altogether absent in this case.

The next ground on which it is suggested that the plaintiff may be put out of Court is on the doctrine of election. That well-known equitable doctrine is stated in the leading case of *Streatfield* v. *Streatfield* decided in 1735 and most conveniently reported in 1 White & Tudor, 440, and I cannot summarize it better than in the words of the learned editors in their notes to that case which begin at the bottom of page 444. They say this:—

"Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both."

The same principle is often put in another form that a person cannot approbate and reprobate the same transaction. In this case that doctrine can have no application for the simple reason that no benefit was taken by this plaintiff of any kind, and that his approbation was a mere expression of intention which had no further consequences. But there is a third doctrine of equity, an obviously indispensable one which has received various legal labels, sometimes being spoken of as election and sometimes as ratification. Its most authoritative exposition for an Indian Court is to be found in the judgment of the Board in

2. (1927) I.L.R. 51 B 475 (F.B.).
3. (1918) L.R. 46 I.A. 72. I.L.R. 42 M. 523: 36 M.L.J. 493 (P.C.).

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the *Goundans' case,*[3] delivered by Lord Dunedin and I think it best to set out the material passage in full.

"No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word What it is based on is this. An alienation by a widow is not a void contract, it is only voidable—*Bijoy Gopal Mukerji* v *Krishna Mahishi Debi*[4] . Now in all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification In some cases it has been expressed as an election to hold the deed good—*Modhu Sudan Singh* v. *Rooka*[5]

"But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

"Of course something might be done even before that time which amounted to an actual election to hold the deed good"

His Lordship points out that an alienation of this nature by a widow is not a void but only a voidable contract, and that it can be affirmed expressly or impliedly by conduct of those whose interest it is to have it avoided. It has been argued that their Lordships meant to confine the class of persons who could validate the voidable contract to a reversioner who had not merely a *spes successionis* but had become *in titulo* to reduce the estate into possession. Giving the best consideration we can to this leading authority, we think that that passage is by way of illustration and should not be treated as exhaustive of the possibilities of a reversioner validating a *prima facie* voidable contract. There are two cases in which a reversioner may lose his rights. The first is when he does something definite and positive to indicate his election to abide by it; the other is where he is merely guilty of laches and sleeps on his rights. It is clear that what their Lordships call a presumptive reversioner like the present plaintiff cannot be deemed to have affirmed the widow's alienation by mere inactivity. He is entitled to bring a declaratory suit but he is not bound to do so; he may wait until the succession opens by the death of the widow and the termination of any other intervening interest.

3. (1918) L.R. 46 I.A. 72: I.L.R. 42 M 523: 36 M.L.J. 493 (P.C.)
4. (1907) L.R. 34 I A. 87: I L R. 34 C 329: 17 M L J 154 (P.C)
5. (1897) L R. 22 I A. 164: I.L.R. 25 C 1: 7 M L J 127 (P C).

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The question is whether the same holds good in the case not merely of passivity but of a positively manifested intention to abide by the act of the widow. That seems to be left open by the concluding words of the passage that I have quoted in which it is said that something may be done even before that time (that is, when the succession opens) which amounted to an actual election to hold the deed good. Their Lordships do not specify what class of cases they had in contemplation. One would obviously be where the presumptive reversioner had brought himself either within the doctrine of estoppel, or had taken a benefit and thereby fallen within the doctrine of election strictly so called as defined in *Streatfield* v. *Streatfield*. The Allahabad and Bombay High Courts held that a third case exists, namely, where although no one has been damnified so as to call into operation the doctrine of estoppel and the reversioner has taken no pecuniary benefit to bring himself within the meaning of the strict doctrine of election he has nevertheless positively and definitively chosen to announce his intention and in fact agreed to abide by the act of the widow. The Full Benches of Allahabad and Bombay have decided that he can do so even while he only occupies the character of a presumptive reversioner. We agree with the Allahabad and Bombay Courts in thinking that if he takes such a step he is personally debarred from resiling from it afterwards. Indeed it is so obviously desirable that the Courts of India should speak with one voice on a matter of such constant recurrence as this that we should not dissent from those decisions unless we were convinced that they were contrary to the decision of the Privy Council in the *Goundans' case.*[3] For the reasons stated we do not think that they are.

Madhavan Nair, J.—I agree.

Jackson, J.—I agree.

N.S. *Reference answered in the affirmative.*

3 (1918) L.R. 46 I.A. 72: I.L.R. 42 M. 523: 36 M.L.J. 493 (P.C.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Kalaga Annapurnamma, minor, by father and next friend Bhamidipati Ramalingaswami Garu.. *Appellant** (*2nd Defendant*)

v.

Kalaga Appayya Sastri and another.. *Respondents* (*Plaintiff and 1st Defendant*).

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Hindu Law—Adoption—Adoption by mother with assent of son after death of son—Validity—Remote reversioner—Right to sue to set aside adoption.

The assent of a son to an adoption by his mother is sufficient assent under Hindu Law to validate the adoption by her after his death, where there is no change in circumstances and there are no other grounds for the next presumptive reversioner to object to the adoption when actually made.

Mami v *Subbarayar,* (1911) I.L.R. 36 Mad. 145: 24 M.L.J. 484 explained and commented on.

Per Kumaraswami Sastri, J. (*in the Order of Reference*)—It is not the law that no reversioner other than the next presumptive reversioner has got the right to sue to set aside an adoption made by the limited owner.

Appeals against the decree of the Court of the Subordinate Judge of Vizagapatam, dated the 7th November, 1922, and passed in O.S. No. 10 of 1921.

A. Krishnaswami Aiyar, B. Satyanarayana and *Y. Suryanarayana* for appellant in Appeal No. 155 of 1923.

S. Varadachariar for *A. Venkatachalam* and *P. Somasundaram* for respondents in Appeal No. 155 of 1923.

S. Varadachariar for *A. Venkatachalam* for appellant in A. S. No. 208 of 1923.

A. Krishnaswami Aiyar, B. Satyanarayana, Y. Suryanarayana and *P. Somasundaram* for respondents in A. S. No. 208 of 1923.

The Court made the following

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ORDER OF REFERENCE TO A FULL BENCH. *Kumaraswami Sastri, J.*—These appeals arise out of a suit filed by the plaintiff claiming to be the next reversioner to one Sambamurthi who died about the year 1907 for a declaration that the adoption by the 1st defendant of one Krishnamurthi, the husband of the 2nd defendant, is not valid. The last male owner of the property was one Sambamurthi, son of one Sanyasi Ayya. He survived

*Appeals Nos. 155 and 208 of 1923. 13th December, 1928

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his father and died unmarried in 1906 or 1907 leaving his mother the 1st defendant who if he died intestate would succeed to the property as mother and heir under Hindu Law. He, however, left a will which has been filed as Exhibit II in the suit, dated the 4th of December, 1906. There is some dispute as to the translation of the will, but for the present it is sufficient to say that by the will he consents to his mother making an adoption and to the son so adopted succeeding to the property. The 1st defendant who was the mother of the deceased Sambamurthi adopted Krishnamurthi, the husband of the 2nd defendant. At the date of the death of Sambamurthi, the nearest reversioners who were admittedly alive were one Bhyravappa who was a major and the present plaintiff who was a minor. Bhyravappa died towards the end of 1909 about a year or a year and a half after the adoption without filing any suit disputing the adoption. It is alleged by the 2nd defendant and denied by the plaintiff that Bhyravappa gave his consent to the adoption and took part in the ceremonies. Krishnamurthi died in 1919 issueless leaving the 2nd defendant his widow. The case of the plaintiff is that the adoption is invalid, that Krishnamurthi acquired no interest in the properties and consequently the 2nd defendant has no interest, that the 1st defendant as the mother of Sambamurthi is entitled to the properties as heir under Hindu Law with the limited estate of a Hindu mother succeeding to her son, that he the plaintiff is the nearest reversioner and that he is entitled to a declaration that the adoption is invalid and not binding on him. The main contentions of the 2nd defendant who is the contesting defendant are that the adoption of her husband is valid both by reason of the will of Sambamurthi and by reason of the consent and active concurrence in the adoption by Bhyravappa and that as Bhyravappa died without disputing the adoption, the plaintiff's claim is barred by limitation; his minority making no difference. The Subordinate Judge dismissed the plaintiff's suit on the ground that it was barred by limitation. He, however, held that the adoption was invalid. Appeal No. 208 of 1923 is by the plaintiff against the decree dismissing his suit, and Appeal No. 155 of 1923 is by the 2nd defendant against the finding as to the invalidity of the adoption. As the Subordinate Judge directed each party to bear his or her own costs making the invalidity of the adoption the ground for depriving the 2nd defendant, who succeeded on the question of limitation, of her costs, the appeal is filed by her against the portion of the decree depriving her of her costs, and thus raising the question as to the propriety of that finding.

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The first question is whether the Subordinate Judge was right in holding that the suit was barred by limitation. There is no dispute that at the date of the adoption there were two reversioners, Bhyravappa and the plaintiff, that Bhyravappa died within two years after the adoption, that the plaintiff was a minor and that his minority could be taken into consideration, a suit which was filed within three years after his attaining majority would be in time. Although each reversioner has got only a *spes successionis* and although a nearer reversioner has got no higher rights than the one who is most distant, a right of suit is allowed to reversioners to question any acts which are prejudicial to the reversion. The nature of such a suit filed by a reversioner has now been settled by their Lordships of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal*,[1] where their Lordships held that where a suit to set aside an adoption is brought by a presumptive reversioner in his representative capacity and on behalf of all the reversioners and if the act complained of is to their common detriment and the right to relief is for their common benefit, the death of one reversioner does not put an end to the suit but entitles another reversioner to be brought on record. They also held that there is no difference between suits to set aside adoption and suits to set aside alienation. This view was followed by their Lordships of the Privy Council in *Janaki Ammal* v. *Narayanasami Aiyar*[2] and *Maharaja Kesho Prasad Singh* v. *Sheo Pargash Ojha*.[3] After the decision in *Venkatanarayana Pillai* v. *Subbammal*[1] questions arose as to the period of limitation for suits by reversioners. In *Varamma* v. *Gopaladasayya*[4] it was held by a Full Bench of this Court that all the reversioners whether existing or thereafter to be born have a single cause of action to set aside an alienation by a widow prejudicial to their reversion, the cause of action arising on the date of the alienation and that where the existing reversioners allow a suit to be barred, the reversioners thereafter born are equally barred. In *Polepeddi Venkatasivayya* v. *Polepeddi Ademma*[5] it was held that a suit brought after the expiry of six years by a reversioner born after the adoption but before a suit became barred under Article 118 of the Limitation Act would be barred even though the nearest reversioner had precluded himself from filing a suit to set the adoption aside. Wallis, C.J., and Seshagiri Aiyar, J.

1. (1915) L.R. 42 I.A. 125: I.L.R. 38 M. 406 28 M.L.J. 535 (P.C.).
2. (1916) L.R. 43 I.A. 207: I.L.R. 39 M. 634 31 M.L.J. 225 (P.C.)
3. (1924) L.R. 51 I.A. 381: 47 M.L.J. 824 (P.C.).
4. (1918) I.L.R. 41 M. 659 35 M.L.J. 57 (F.B.).
5. (1920) 39 M.L.J. 621.

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were of opinion that the birth of a reversioner after the adoption did not give him any fresh cause of action or stop the running of time against the whole body of reversioners.

These cases do not touch the present question as the appellant was in existence at the date of the adoption and the next presumptive reversioner died a year and a half after the adoption before his suit would have become barred. It could not be said that he allowed the suit to become barred by not suing within six years. If the present appellant who was in existence at the date of the adoption had the right to impeach the transaction and if the next reversioner died before the period of limitation expired, there seems to be no principle on which it can be held that a suit by a remoter reversioner who was a minor at the date of the death of the next presumptive reversioner would be barred by limitation if filed within three years of his attaining majority.

It is contended by Mr. Krishnaswami Aiyar for the respondent that each reversioner has not got a right to sue even though there is an injury to the reversion but only the immediate presumptive reversioner, that time begins to run against the whole body of reversioners from the date of the adoption which is impugned and that if the next minor reversioner does not file a suit before the period of limitation so far as the adult reversioner is concerned expires, he cannot claim extension on the ground of his minority. He argues that if a reversioner born subsequently cannot claim the benefit of section 6, one in existence on the date of the adoption cannot do so. As I pointed out before, in the present case the next presumptive reversioner died within 1½ years after the adoption which was long before the period of limitation would expire and the next presumptive reversioner was a minor. The question is whether section 6 of the Limitation Act would give the minor who on the death of Bhyravappa was the next presumptive reversioner a right to sue within three years after he attained majority.

I shall first deal with the contention that no reversioner other than the next presumptive reversioner has got the right to file a suit to set aside the adoption. There is no authority for the proposition that it is only the next presumptive reversioner that has the right to challenge the alienation or adoption by a widow. Each reversioner is equally affected by the adoption and his interests are as much prejudiced as the interests of the next presumptive reversioner as it may be that when the widow dies a person lower in the scale of heirs may be the person entitled to the property. It is difficult to conceive of a representative suit

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where the persons represented have no cause of action or no injury to redress. In *Venkatanarayana Pillai* v. *Subbammal*[1] their Lordships of the Privy Council observed:

"There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary right which entitles the reversioners to sue"

These observations of their Lordships clearly indicate that a remoter reversioner has a right to impeach the transaction which right he can enforce though under ordinary circumstances the person who is to file a suit to enforce the right is the next presumptive reversioner. The rule of law that the suit should be filed by the next presumptive reversioner unless the remoter reversioner can show that the next reversioner disabled himself from filing the suit either by concurrence in the transaction or by collusion with the widow is based on principles of expediency and to prevent multiplicity of suits rather than on a negation of the rights of the remoter reversioner to impeach the transaction. In *Rani Anandkunwar* v. *The Court of Wards*[6] their Lordships of the Privy Council observe:

"Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir—that is to say, by the person who would succeed if the widow were to die at that moment They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering They consider that the rule laid down in *Bhikaji Apaji* v. *Jagannath Vittral*[7] is correct. It cannot be the law that anyone who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue; see *Kooer Goolab Singh* v *Rao Kurun Singh*[8]"

I agree with the following observations of Wallis, C. J., in the order of reference in *Varamma* v. *Gopaladasayya*.[4] The learned Chief Justice observes:

"It also follows I think that as pointed by the Full Bench, the cause of action of all the reversioners is the same and arises on the date of the alienation, and that the question dealt with in *Rani Anandkunwar* v *The Court of Wards* as to when a remote reversioner is to be allowed to sue is

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1. (1915) L.R. 42 I.A. 125: I.L.R 38 M 406: 28 M.L.J. 535 (P.C.).
4. (1918) I.L.R. 41 M 659: 35 M.L.J. 57 (F.B.).
6. (1880) L.R. 8 I.A. 14: I.L.R. 6 C 764 (P.C.).
7. (1878) 10 B.H.C.R. (A.C.J.) 351.
8. (1871) 14 M.I.A. 177.

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merely a question as to which reversioner should have the conduct of the suit which is instituted on a cause of action common to all."

It seems to me therefore there is no point in the argument that no reversioner other than the next presumptive reversioner has got the right to sue to set aside the adoption.

If on the death of the next adult presumptive reversioner before the suit is barred, the person next to him is a minor, the question is whether he is entitled to the benefit of section 6 of the Limitation Act. In this connection it is well to consider sections 6, 7 and 9 of the Limitation Act. Section 6 enacts that where a person entitled to institute a suit is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule. By section 8 the period is not extended beyond three years after attaining majority. Section 7 relates to the disability of one of several plaintiffs and enacts that in cases where a discharge can be given without the concurrence of the minor, time will run against all the persons jointly entitled to institute the suit; but where no such discharge can be given time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased. Section 9 states that once time has begun to run, no subsequent disability or inability to sue stops it. It is argued by Mr. Varadachariar that in the case of reversioners, who do not claim through each other, no reversioner, however near in grade can give a discharge so as to bind the other reversioners and section 7 has no application to the facts of this case, that section 9 would not bar the plaintiff as he was alive at the date of the adoption and there was no subsequent disability after the time commenced to run, that section 6 therefore applies to this case and that the suit is not barred. If this argument is accepted, the plaintiff is clearly in time. Mr. Krishnaswami Aiyar for the respondent argues that having regard to the nature of the reversionary rights and to the fact that the injury is, according to their Lordships of the Privy Council, common to the reversion, the plaintiff would not be the person entitled to institute the suit when the adoption was made so as to attract the provisions of section 6 of the Limitation Act. He also argues that on the principle of law that if the next reversioner is barred by limitation the whole body would be barred, and that decrees

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obtained by or against the next presumptive reversioner with reference to the reversion would bind all the other reversioners, the fact that no suit was filed within 6 years after the adoption bars all the reversioners, adults or minors as Bhyravappa was alive and did not sue, that if Bhyravappa had been alive for 6 years the suit would have been barred irrespective of the plaintiff's minority and that his death would not make any difference.

Having regard to the importance of the question and the absence of any authorities bearing directly on the point, I think it necessary that the point should be referred to a Full Bench which will settle the law on the point.

The next question is as to the validity of the adoption of the 2nd defendant's husband. He was adopted by the 1st defendant. It is admitted that 1st defendant's husband did not give any authority to adopt and the ground on which the validity of the adoption is sought to be established is that the adoption was made with the consent of her son, the deceased Sambamurthi and also with the consent of Bhyravappa, the immediate presumptive reversioner. There is no dispute as to the factum of the adoption. As regards the alleged consent of Bhyravappa, the Subordinate Judge did not believe the evidence and was of opinion that no such consent was given. There is no documentary evidence as to any consent by Bhyravappa and as pointed out by the Subordinate Judge, Exhibit III the deed executed by the natural father of the adopted boy refers only to the consent of the 1st defendant's son Sambamurthi expressed by his will, dated the 4th December 1906. If as a matter of fact the next presumptive reversioner was asked and signified his express consent to the adoption, it is hardly likely that so important a fact would have been omitted in Exhibit III executed contemporaneously. There is the evidence of defendant's 15th witness, the wife of Bhyravappa, of defendant's 5th witness, the brother-in-law of Bhyravappa and of defendant's 10th witness, the natural mother of the adopted boy as to Bhyravappa giving express consent and this has been relied upon as strongly supporting the case of the 2nd defendant that Bhyravappa gave his consent. But it appears from the cross-examination that these witnesses are interested in the 2nd defendant and I cannot say that the Subordinate Judge was wrong in not placing reliance on their evidence. There is, however, evidence to show that Bhyravappa knew of and was present at the adoption. Bhyravappa was living next door and there is no suggestion that he was not in the village at the time of the adoption and the probabilities are that he was present at the adoption like other relations. It

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is also in evidence that the mother of the present plaintiff was present and that she accompanied the adopted son after the adoption to Benares where *sradh* was performed. The plaintiff was a minor at the time, and there can be no question of his consent or acquiescence by conduct. I think the evidence shows that the adoption was made on the footing of the consent having been already given by the son of the 1st defendant in his will, and that Bhyravappa and the other relations raised no objection to the adoption. Probably they all thought that consent had already been given and they were present at the ceremony. It is clear that if the adoption was made on the footing of the consent by the son, the mere presence of the next presumptive reversioner would not make the adoption valid if the consent of the son on the basis of which the adoption was made is not proved or is invalid. I do not think the adoption can be supported on the footing of Bhyravappa's consent. There can be no doubt that the son did assent to the adoption in Exhibit II, his will dated the 4th of December 1906, the genuineness of which is not questioned. There was some dispute as regards the translation of the will and we had it translated by the Chief Interpreter of this Court on the Original Side. The correctness of this translation is not disputed. After referring to the properties, the testator proceeds as follows:—

"As to this, as I am apprehensive that there will be no continuation of the family after my lifetime, as, being unmarried, I have no issue, and as I am apprehensive whether my mother may, after my lifetime, suffer trouble at the hands of the *gnatis* (agnatic sapindas), (I direct that) till our family is continued and the lineage becomes established, my mother shall under this will make an adoption in my stead and, after the adopted boy attains majority, shall hand over to the possession of the said adopted boy all the property, moveable and immoveable belonging to me."

The words "I direct that" after the word "gnatis" and before "till our family" are put in brackets by the Chief Interpreter. It is clear that so far as the authority to adopt is concerned, it can only be given by the husband, so that the will in law can only amount to a consent by the son who under the Hindu Law would be the nearest sapinda of his mother. A consent need not be by a registered instrument or in any form and when it is by will and the executant who is a sapinda can only consent to the adoption there is no reason why the will should be read as an "authority" to adopt and not merely as a consent to the proposed adoption. It is contended by Mr. Krishnaswami Aiyar that the consent of the son would be sufficient assent of a sapinda to the validity of the adoption, the son being a sapinda of his mother and the law only requiring the assent of a sapinda, that

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such assent may be given by will and that as the adoption with the assent of the son can only be made after his death, the Hindu Law forbidding any adoption to his father during his lifetime, the death of the son makes no difference. It is contended by Mr. Varadachari for the plaintiff that a son can never consent to an adoption as a sapinda, as the consent of sapindas contemplated in Hindu Law is the consent of sapindas existing at the time of the adoption and that the death of the person giving consent puts an end to the consent.

As regards the widow's power to adopt, the necessity for the widow making the adoption to get the consent either of her husband or of the sapindas is based on the texts of Vasishta "let not a woman give or accept a son unless with the assent of her husband" and on the texts of Manu and other writers that a woman who is to be under the protection of her parents during her youth, of her husband during coverture and of her son after her husband's death or of the elder members of the family in the absence of a son cannot act independently of advice. This text of Vasishta has been construed in Bengal and Benares as prohibiting an adoption after the husband's death. Vijnaneswara and other commentators however treat the text as limited to an adoption made during the husband's lifetime, and are of opinion that after his death the assent required by Vasishta to be given by the husband during his lifetime is sufficiently replaced by the assent given by sapinda such assent taking the place of the assent of the husband. Now, there can be little doubt that under all the texts the mother after the death of the husband is under the protection of her son who is her nearest sapinda and I can see nothing in the texts which disqualifies a son giving assent to an adoption because *ex hypothesi* the adoption could only be made after his death. In *Collector of Madura v. Mootoo Ramalinga Sethupathy*[9] their Lordships of the Privy Council dealing with the assent of sapindas observe:

"It is not easy to lay down an inflexible rule Every case must depend on the circumstances of the family All that can be said is, that there should be such an evidence of assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from corrupt motives"

In *Velanki Venkata Krishna Rao v. Venkata Rama Lakshmi*[10] their Lordships of the Privy Council again emphasise this view and observe:

"All that is required to be established is that there was such a consent as would be sufficient to support the inference that the adoption was not

9 (1868) 12 M.I.A. 397.

10 (1876) L.R. 4 I.A. 1: I.L.R. 1 M. 174 (P.C.).

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made from capricious or corrupt motives, but upon a fair consideration of the expediency of substituting an heir by adoption to the deceased husband."

If the propriety or the necessity of the adoption is to be considered, there can be little doubt that in the present case there was every reason for the 1st defendant's son to assent to the adoption. There is no suggestion that the adoption was made from any corrupt or improper motive. I can find no authority for the proposition that the assent of the son is not the assent of the sapinda and that his assent would be invalid. Sarcar in his valuable work on adoption is of opinion that there is nothing to prevent a son from giving authority to his mother to adopt as the son is the legal guardian of his widowed mother under Hindu Law and he refers to Strange's Hindu Law, Vol. I, page 93 (see Sarcar on Adoption, page 255, 2nd Edition). He is the person most concerned both in getting an heir who will perform his *sradh* and perpetuate his family, the two purposes which according to Manu and other writers justify or necessitate an adoption. I agree with the remarks of Sarcar in his work on adoption that the son's assent is sufficient. The argument of Mr. Varadachariar is that the assent of the sapinda is not valid to support the adoption if the adoption is actually made after the assenting sapinda is dead. As regards the necessity for the assenting sapinda to be alive at the date of the adoption there seems to be a conflict of authorities in Madras, but the balance of authority is in favour of the view that unless there has been a change of circumstances between the date of the assent and the date of the adoption, the assent of the sapinda, though dead at the time of the adoption, is sufficient to support its validity. In *Mami* v. *Subbarayar*[11] it was held by Benson and Abdur Rahim, JJ., that a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption if it is not approved of or is objected to by the persons who are the nearer sapindas at the time of the adoption. In this case the consent was contained in a will by which the son authorized his mother to make an adoption, and the adoption was made, but it was found that the *dayadis* did not expressly consent to it. It was held that the adoption was invalid. I may point out that the view the learned Judges took is that the adoption would be valid "if it was not disapproved" by the sapindas, and in the present case they did not disapprove of it but attended the ceremony. In Appeals Nos. 294 and 354 of 1921, Krishnan and Ramesam, JJ., were

11. (1911) I.L.R 36 M. 145: 24 M.L.J. 484.

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of opinion that no sapinda is entitled to give, by way of a will to take effect after his death, a consent to an adoption by a widow. They seem to place some importance on the fact that the widow never applied for any consent in that case. With respect, it seems to me that the application by the widow for consent has no bearing as it cannot be said that the adoption would be invalid if the reversioners asked the widow to adopt and she does so at their request. The extreme view taken in *Mami* v. *Subbarayar*[11] that the death of the assenting sapinda necessarily puts an end to the efficacy of the consent has not been accepted in the later decisions. In *Suryanarayana* v. *Ramadoss*[12] it was held that mere lapse of time without more or the death of the consenting sapinda will not put an end to a consent freely and *bona fide* granted. In *Anne Brahmayya* v. *Chelasami Rattayya*[13] Ramesam and Jackson, JJ., were of opinion that the death of the consenting sapinda would not affect the validity of the adoption if the adoption was made within a reasonable time after the consent. Ramesam, J., at page 517 observes as follows:—

> "In my opinion there is an essential difference between the authority of the husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband. The latter is intended to be used at a reasonable time after the consent is given When the interval is short, the death of the sapinda may not matter, but a sapinda's assent is not to be pocketed by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply."

This seems to be in consonance with the view taken in *Suryanarayana* v. *Ramadoss*[12] though it is difficult to reconcile it with the view taken by the learned Judge in Appeals Nos. 294 and 354 of 1921. In *Ammanna* v. *Satyanarayana*[14] the question was considered by Odgers and Viswanatha Sastri, JJ., and it was held that the consent of the nearest sapinda for an adoption made by a widow can be acted upon after his death if no objection is taken by the sapindas alive at the date of the adoption. I may point out that in *Krishnayya* v. *Lakshmipathi*[15] their Lordships of the Privy Council at page 659 in dealing with the contention that the death of the sapinda puts an end to the power expressly refrain from expressing any opinion upon this and other matters which were argued. Owing to the difference of opinion I have referred to above between the

11. (1911) I.L.R. 36 M. 145: 24 M.L.J. 484.
12. (1917) I.L.R. 41 M. 604: 34 M.L.J. 87.
13. (1924) 20 L.W. 503.
14. (1925) I.L.R. 49 M. 636: 51 M.L.J. 426.
15. (1920) I.L.R. 43 M. 650: L.R. 47 I.A. 99: 39 M.L.J. 70 (P.C.).

Benches of this Court, I think this question ought to be referred to a Full Bench.

I would refer the following questions for the decision of a Full Bench:—

(1) Whether a suit filed by a reversioner who was a minor at the date of adoption would be in time if filed within three years after his attaining majority where the immediate presumptive reversioner dies before the period of limitation expires; and

(2) Whether the assent of a son to an adoption by his mother is sufficient assent under Hindu Law to validate the adoption where there is no change in circumstances and there are no other grounds for the next presumptive reversioner to object to the adoption when actually made.

Reilly, J.

Reilly, J.—I agree that the two questions should be referred to a Full Bench and I agree also with the view of the facts of this case taken by my learned brother.

A. Krishnaswami Aiyar and *Y. Suryanarayana* for appellant in Appeal No. 155 of 1923.

T. M. Krishnaswami Aiyar for *A. Venkatachalam* and *P. Somasundaram* for respondents in Appeal No. 155 of 1923.

T. M. Krishnaswami Aiyar for *A. Venkatachalam* for appellant in Appeal No. 208 of 1923.

A. Krishnaswami Aiyar, Y. Suryanarayana and *P. Somasundaram* for respondents in Appeal No. 208 of 1923.

The Court expressed the following

OPINION.—The second question referred to us for decision is—

"Whether the assent of a son to an adoption by his mother is sufficient assent under Hindu Law to validate the adoption where there is no change in the circumstances and there are no other grounds for the next presumptive reversioner to object to the adoption when actually made"?

In this Presidency the law is well settled that a Hindu widow, not having her husband's permission may, if duly authorized by his kindred, adopt a son to him (see *Collector of Madura* v. *Mootoo Ramalinga Sethupathy*[9]). It is also settled that the condition regarding the consent of the husband's kindred is sufficiently satisfied if the consent of the nearest sapindas—even if there be only one such—be obtained (*Subrahmanyam* v. *Venkamma*[16] and *Veerabasavaraju* v. *Balasurya Prasada Rao*[17]) they being

9. (1868) 12 M.I.A 397.
16 (1903) I.L.R. 26 M 627 at 635: 13 M.L.J. 239.
17. (1918) L.R 45 I.A 265: I.L.R. 41 M. 998: 36 M.L.J. 40 (P.C.).

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by virtue of the relationship the most competent advisers of the widow and the proper judges of the propriety of her act in making the adoption. As observed in the referring order, under the Hindu Law, the mother is under the protection of the son, who is the nearest sapinda after the husband's death. It follows that *prima facie* his assent is sufficient to validate an adoption by his mother. According to the theory underlying the law of adoption this assent of the son can be acted upon only after his death. Does the fact that the son is not alive when the adoption is actually made render his consent ineffectual and in consequence, the adoption invalid?

It is argued on one side that the son's consent is valid as he is the natural guardian and protector of the widowed mother and is the person most interested in the main purposes which constitute the necessity for the adoption, namely, the performance of his *sradh* and the perpetuation of his family. On the other side it is contended that the consent contemplated is that of the sapindas whose presumptive or reversionary rights would be defeated by the adoption and not of the deceased son as regards whom no question of endangering proprietary interests could possibly arise. In *Collector of Madura v. Mootoo Ramalinga Sethupathy*[9] wherein the validity of a widow's adoption with the consent of her husband's kindred was authoritatively laid down, their Lordships of the Privy Council observed that—

"the assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption."

That the rights of property should also be taken into account was for the first time expressed in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*[18]. At page 83 the Privy Council said:

"It may be the duty of a Court of Justice administering the Hindu Law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property It seems, therefore, to be the duty of the Court to keep the power strictly within the limits which the law has assigned to it."

9. (1868) 12 M.I.A. 397.
18. (1876) I.L.R. 1 M. 69 · L.R. 3 I.A. 154 (P.C.)

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In *Veerabasavaraju* v. *Balasurya Prasada Rao*[17] the Board after stating that in the judgment in the Ramnad case some expressions were used which might imply that the question of reversionary interest formed only a secondary consideration in determining what sapindas' assent was primarily requisite observed that rights to property cannot be left out of consideration in the determination of the question. It is noteworthy that in the latter two cases the language of the Board is guarded and their Lordships do not say that proprietary rights form the paramount consideration. The necessary result of every adoption is to divest the sapindas of the interest of the widow's husband which devolved on them; this circumstance by itself should not therefore be regarded as conclusive in determining the validity of the consent on the strength of which the adoption is made. Having regard to these circumstances, the observations of the Privy Council adverting to the importance of proprietary rights in relation to the validity of sapindas' consent can only be understood to mean that such consideration should not be lost sight of but should be given due weight in determining what sapindas' consent would be sufficient.

That the ultimate effect of an adoption on the reversionary interest of the sapindas does not form the primary consideration in determining the question may be gathered from the views of the Privy Council regarding the nature of the evidence of consent required in cases of this description. The Ramnad case laid down that "there should be such an evidence of consent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from corrupt motives." In *Velanki* v. *Venkatarama*[10] the Board observed:

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow and that all that which this Committee in the former case intended to lay down was that there should be such proof of consent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but upon a fair consideration of what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

This proposition was referred to with approval in *Veerabasavaraju* v. *Balasurya Prasada Rao*[17]. It follows that the decisive consideration in such cases is whether the adoption was a proper and *bona fide* act; and in coming to a conclusion on

10. (1876) L.R. 4 I A 1: I.L.R. 1 M. 174 (P C).
17. (1918) L.R. 45 I.A. 265: I.L.R. 41 M. 998: 36 M.L.J. 40 (P.C.).

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that point, the fact that the sapinda giving the consent had no proprietary interest to lose or that it will prejudicially affect the property rights of the nearest reversioners at the time of the adoption will merely be an important element for consideration.

The crucial test being as stated above, the consent of the son who is the nearest sapinda would be sufficient if the circumstances showed that the adoption was made by the widow in the proper and *bona fide* performance of a religious duty, and the real motive which actuated her was the conferment of spiritual benefit on her husband. The adoption would not be vitiated merely because the son had no proprietary interest to lose by the adoption when actually made or it tended to defeat the reversionary rights of other sapindas. If, however, the evidence bearing on consent leads to the conclusion that the motive which actuated the widow in making the adoption was to defeat the reversionary interest of the sapindas, then the adoption would necessarily be invalid. These being the true considerations, it would follow that the death of the son will not affect the validity of his consent or of the adoption based on it.

No authority has been brought to our notice in support of the contention that the assenting sapinda should be alive at the time of the adoption. The question was raised before the Judicial Committee in *Krishnayya* v. *Lakshmipathi*,[15] but their Lordships refrained from expressing any opinion on it. In *Suryanarayana* v. *Ramadoss*[12] Seshagiri Aiyar, J., with whom Ayling, J., concurred, held that the death of the consenting sapinda will not put an end to a consent freely and *bona fide* granted. To the same effect is the decision in *Anne Brahmayya* v. *Chelasani Rattayya*[13]. In that case Ramesam, J., observed:

"When the interval is short, the death of the sapinda may not matter; but a sapinda's assent is not to be pocketed and used long after it is given when entirely different considerations as to the expediency of the adoption may apply."

In *Ammanna* v. *Satyanarayana*[14] Odgers and Viswanatha Sastri, JJ., upheld an adoption made by a widow after the death of the assenting sapinda and approved by the sapinda living at the time of the adoption. Viswanatha Sastri, J., however, was prepared to go to the length of holding that such subsequent approval was not essential. *Vide* his observations at page 649 to the effect that

"in my opinion the trend of these decisions is that when the consent is given by the father-in-law who happens to be the nearest sapinda then

12. (1917) I.L.R 41 M. 604: 34 M.L.J 87.
13. (1924) 20 L.W. 503
14. (1925) I.L.R. 49 M 636: 51 M.L.J. 428
15. (1920) I.L.R 43 M 650: L.R 47 I.A. 99: 39 M.L.J. 70 (P.C.).

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living, his death before the adoption is made would not *ipso facto* revoke the consent; and that such a consent would come to an end only if the circumstances had materially changed after his death.''

If, as we have already pointed out, the determining factor is the object of the widow in making the adoption and the considerations based on the loss of proprietary rights of the reversioners merely serve as aids in appreciating the true nature of the consent and the circumstances relating to the adoption, it is difficult to perceive the necessity for the subsequent consent or approval of the reversioners living at the time when the adoption is actually made. The reservation that the consent should be acted upon with reasonable promptitude and that circumstances should not have undergone a material alteration would seem to meet the ends in view irrespective of the question whether the assenting sapinda was dead at the time of the adoption or whether those living then approved it.

The doctrine of subsequent approval was suggested in the decision in *Mami* v. *Subbarayar*[11]. It may at once be stated that it is not an authority for the extreme view that the death of the assenting sapinda necessarily puts an end to the efficacy of the consent. The case merely decided that the adoption on the basis of the consent of a deceased sapinda would be invalid "if not approved of by the persons who are the nearest sapindas at the time of the adoption". A close examination of that decision shows that the Judges were considerably influenced by the fact that the death of the assenting sapinda would make his consent irrevocable. It is not evident why that circumstance should destroy the efficacy of the consent. Its validity has to be tested solely by the consideration laid down in the judgments of the Privy Council already referred to and if it satisfies them the consent should be allowed to have full operation irrespective of the fact that the assenting sapinda had died. In dealing with the argument that adoption within a reasonable time after the death of the assenting sapinda would be valid the learned Judges observe:

''No doubt it may not be necessary that the consent should be given actually at the time the adoption is made, but it seems to us that at any rate a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made''

This pronouncement is halting and indecisive. In *Suryanarayana* v. *Ramadoss*[12] this case was considered by Seshagiri

11. (1911) I.L.R. 36 M. 145: 24 M.L.J. 484.
12. (1917) I.L.R. 41 M. 604: 34 M.L.J. 87.

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Aiyar, J., with whose comments we agree (see also *Ammanna* v. *Satyanarayana*[14]).

For the above reasons, the answer to the second question referred to us is in the affirmative.

In view of our answer to the second question, we do not think it is necessary to consider the first question.

N.S. *Second question answered in the affirmative. First question not answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

P. L. S. P. Muthiah Chetty through his son and authorised agent Palaniappa Chetty .. *Appellant** (*Plff.*)

v.

K. R. V. R. Veerappa Chetty by his agent 5th respondent herein and others .. *Respondents* (*Defts.*)

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Partnership—Partner—Assignment of interest of a—Assignee's rights under—Settlement of accounts by other partners behind back of assignee—Effect on him of—Winding up of partnership—Rate of exchange for conversion of one currency into another in case of—Ascertainment of—Date proper for currency—Conversion of one, into another—Date for ascertaining rate of exchange for purpose of

A person who has obtained an assignment of the interest of a partner in a partnership is entitled to an account of the partnership as from the date of dissolution of the partnership and a settlement of the accounts of the partnership by the other partners behind the back of the assignee will not be binding on him as a settlement.

The proper date for ascertaining the rate of exchange for the purpose of converting one currency into another is not the date of the determination, by the Court, of the amount due to the plaintiff but is the date when the amount was properly due to the plaintiff In the case of a partnership which is wound up, the date of the termination of the winding up would be the proper date for fixing the rate of exchange and not the date of the final decree in the suit for accounts of the dissolved partnership

Manners v *Pearson & Son*, (1898) 1 Ch 581 not followed

Appeal against the decree of the Court of the Additional Subordinate Judge of Sivaganga, dated 21st September, 1923 in O.S. No. 58 of 1923 (O.S. No. 10 of 1922, Sub-Court, Sivaganga).

T. M. Krishnaswami Aiyar and *M. Subbaroya Aiyar* for appellant in A. S. No. 340 of 1924 and for 1st respondent in A. S. No. 204 of 1925.

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*Appeals Nos. 340 of 1924 and 204 of 1925. 21st January, 1929

14. (1925) I.L.R. 49 M. 636: 51 M.L.J. 426.

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K. S. Venkatarama Aiyar for 1st respondent in A. S. No. 340 of 1924.

S. Varadachariar and *K. S. Venkatarama Aiyar* for appellants in A. S. No. 204 of 1925.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—These two appeals arise out of the same original suit and in each appeal there is a memorandum of objections. Appeal No. 340 of 1924 is by the plaintiff and the memorandum of objections is by the 1st respondent who is the 1st defendant. Appeal No. 204 of 1925 is filed by defendants 1 and 7 and the memorandum of objections is preferred by the plaintiff who is the 1st respondent.

The facts may be briefly stated as follows:—Defendants 1 to 3 and the father of the 4th defendant entered into a partnership for carrying on a money-lending business at Harit Buntar in the Federated Malay States under the name and style of R.M.V.R.A.M. This was on 23rd March 1914. Four partners had equal shares in it. The 4th defendant's father died in August 1916; but the business was continued with the 4th defendant as a partner in his place by the consent of all the partners. In or about April 1917 a new partnership was constituted by taking in two new partners, defendants 5 and 6. In the new partnership the 1st defendant's share was the largest and the shares of the 5th and 6th defendants were smaller than the others. The 7th defendant is a son of the 1st defendant, the 8th defendant is a son of the 4th, the 9th defendant is a son of the 6th defendant and the 10th defendant is a son of the 5th. On the 25th January, 1919, the 3rd defendant executed Ex. C in favour of the present plaintiff purporting to transfer his interest in the partnership. He informed the firm of the fact of transfer by two letters, Ex. E, dated the 28th of January 1919 sent directly and Ex. D (1) handed over to the plaintiff and forwarded by him with Ex. L. Ex. H is a hundi for Rs. 16,500 which was the consideration for the assignment. The 1st defendant having learnt of Ex. E replied by a registered letter Ex. F dated 4th March 1919. In it he says that he had written to Arunachalam the 6th defendant who was then the local agent to close the business at the termination of his agency and wind up the firm and not to enter into any new transactions but to make the necessary collections and disbursements for winding up the firm. The plaintiff addressed Ex. L on 16th March, 1919 to the 6th defendant. Ex. D(1) was sent as an enclosure with this letter. Ex. G was a

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letter by the 3rd defendant to the 1st defendant in which he acknowledges the receipt of Ex. F. Meanwhile the 3rd defendant's son raised a dispute about the validity of the assignment by the 3rd defendant and he issued through his vakil the notice Ex. I contesting the validity of the assignment. He also issued a similar letter to the 4th defendant—Ex. VI. Ex. II is a letter addressed by the plaintiff to the 1st defendant in which he requests that he should be taken as a partner in the firm and that the firm should not stop business merely because the 3rd defendant's share was transferred to him. In September 1919 a new firm was formed by defendants 1 and 6 and Ex. N is the power-of-attorney executed by the 1st defendant in favour of the 6th defendant. Ex. J is a registered deed of assignment confirming Ex. C which was not registered. In March 1920 the plaintiff's agent in the Federated Malay States got his solicitors, Messrs. Gibb and Hope to issue the notice Ex. III to the 6th defendant demanding him to render an account of the profits of the firm. Ex. III-A is the reply to Ex. III by Messrs. Donaldson and Burkinshaw, Solicitors of the 6th defendant. In this letter they refer the plaintiff's solicitors to the 1st defendant on the ground that the 6th defendant was only accountable to him. They also refer to the fact that the 3rd defendant's son raised a dispute as to the assignment. On this ground they refused to recognise the plaintiff's right to demand an account. Ex. IV is the reply to Ex. III-A in which Messrs. Gibb and Hope say that they had also written to the 1st defendant. They also intimate their intention of filing a plaint and request the addressees to make arrangements for accepting service at Perak. Ex. IV-A is the reply to Ex. IV. It says that Veerappa Chetty (the 1st defendant) does not admit that the plaintiff has any rights. It is dated 31st March 1920. There is no further correspondence up to December. On 6th December Messrs. Donaldson and Burkinshaw addressed the letter Ex. V to the plaintiff and the 3rd defendant and to his son. In this letter they say:—"The firm has now been wound up and the accounts are ready. Veerappa Chetty, the managing partner, desires to close the matter and pay out the sums due". They then refer to the fact of receipt of notice of assignment from the plaintiff and notice of objection from the 3rd defendant's son. They also say that unless the disputes are settled by agreement or otherwise payments cannot be made. The present suit was filed on 20th January, 1922. Meanwhile the 3rd defendant's son himself filed a suit O.S. No. 42 of 1919. That suit was finally settled by reference to arbitrators and

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their award in August 1922. Under this award the 3rd defendant's right to assign was recognised by his son. In the written statement of the defendants they plead that there was a settlement of the accounts of the partnership on or about 29th March, 1920. On the basis of this settlement a certain sum of money was allotted to the 3rd defendant and the basis of the settlement was also accepted by defendants 2 and 5. The Subordinate Judge finding that the settlement is not binding on the plaintiff, has gone into the accounts himself and found that in addition to the assets found according to the settlement certain other sums under various headings were due to the partnership and the plaintiff's share in such additional sum was found to be 1,380 dollars. The first item of dispute between the parties is whether the plaintiff is entitled to this additional sum.

Another question in the case is, what is the rate of conversion of dollars into the British Indian currency. As the exchange was varying between January 1919 and April, 1925, the date of the final decree, this question turns upon the date when the conversion into British Indian currency should be made. The dollar reached its lowest value on 11th March, 1920 when 100 dollars were equivalent to Rs. 95 and on 29th March, 1920 it was Rs. 99-8-0. The Subordinate Judge held that the date of the final decree should be adopted as the date of conversion. These two questions are the subject of Appeal No. 204. The appellants (defendants) contend that the settlement of 29th March 1920 should be held to be binding on the plaintiff and that the same date ought to be adopted as the date of conversion into British Indian currency.

Taking up the first question as to the binding nature of the settlement of 29th March, 1920, I may observe that the settlement itself is somewhat suspicious. I have already referred to the replies, Exs. III-A and IV-A of Messrs. Donaldson and Burkinshaw to the letters of Messrs. Gibb and Hope (Exs. III and IV) demanding settlement of accounts. In Ex. III-A the solicitors simply denied the plaintiff's right to certain amounts and did not invite the plaintiff to be present at any intended settlement, so that at least the settlement may be binding on him and so that he may not claim more than the amount ascertained if it turned out that the assignment is valid. In Ex. IV-A it was not said that any accounts were settled. The letter merely denied the plaintiff's right. The account book, Ex. VII, contains entries under the

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date 29th March. At the time of the settlement defendants 1, 4 and 6 were present. There were also present four panchayatdars and one of these panchayatdars is now examined as D.W. 1, the 1st defendant is examined as D.W. 2 and the 3rd defendant was examined on commission and his deposition is filed as that of D.W. 3. It does not appear that the 3rd defendant ever raised any objection to the settlement of accounts now relied on by the 1st defendant. D.Ws. 1 and 2 were not asked as to when the settlement was actually made. Below the signatures of the panchayatdars and of defendants 1 and 6 there is the signature of the 2nd defendant and this signature bears the date 12th May 1922. This only shows that the 2nd defendant approved of the settlement on 12th May 1922. That the accounts were ready and that the 1st defendant desired to close the matter was communicated for the first time to the plaintiff in December 1920 by Ex. V. These facts above mentioned are all consistent with the entries being made at any time between 24th March, 1920 and 8th December, 1920. There is nothing to show that the entries must have been made on 29th March, 1920. Whenever the entries were actually made they were made as on the date of 29th March, 1920. If they were really made earlier than December 1920 the fact was certainly not communicated to the plaintiff and from the point of view of the plaintiff it cannot be said that any settlement of accounts came into existence before 6th December 1920. It is true that in Ex. F the 1st defendant informed the 3rd defendant that he instructed his agent the 6th defendant to proceed with the termination of the then agency and as the agency began on 25th April 1917 and as the practice of the Chetti firms is to carry on any particular agency for three years, one might infer that the 1st defendant's intention was to close the account by 25th April 1920; but beyond this intention to close the account by 25th April 1920 there was nothing else to show that the account was actually closed on any particular date until we come to Ex. V. We must therefore hold that the plaintiff had the first notice of the closing of accounts on 6th December 1920 and he was not bound to recognise any such closing prior to that date. Assuming that there was some such settlement, the next question is—is it binding on the plaintiff? Mr. Varadachari relied on *Chidambaram Chetty* v. *Karuthan Chetty*.[1] It was observed in this decision that the principle of section 31 of the English Partnership Act may be recognised as the principle to be adopted in India. So far as the first

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1. (1916) 4 L.W. 10.

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clause of the section is concerned it gives the assignee no right to interfere in the affairs of the partnership and all *bona fide* actions during the continuance of the partnership will be binding on him. Under clause 2, the assignee is entitled to an account as from the dissolution. In the present case the other partners were not willing to take the plaintiff as a partner and they all agreed to dissolve the partnership. This could have only been by March 1919. But the pleadings in the case show that all the parties recognised 25th January, 1919 as the date of dissolution. In the decision in *Chidambaram Chetty* v. *Karuthan Chetty*[1] clause 2 of section 31 was also referred to and it was observed that it may be taken as the law in India. In *Dhanaji Jhelaji* v. *Gulabchand Pana*[2] it was observed that the Common Law with regard to the position of an assignee of a partner was codified by section 31 of the Partnership Act and section 31 (2) was also recognised as having codified the Common Law. In *Hugh Stevenson and Sons* v. *Aktiengesellschaft fur Cartonnagen Industrie*[3] Lord Atkinson referred to the decision of Grant, M.R., in *Featherstonhaugh* v. *Fenwick*[4] and pointed out that at Common Law the assignee of a partner was not bound by any settlement behind his back. He also referred to the approval of the rule by Lord Selborne and Lord Blackburn in *Cassels* v. *Stewart*[5]. He also pointed out that the relation of surviving partners and the representative or assignee of the outgoing partner is a fiduciary relation. So it must be taken that section 31(2) of the Partnership Act only codified the Common Law. If so, a settlement behind the back of the assignee cannot be binding as a settlement. Lord Lindley states the rule at page 450 thus:

> "His rights are not affected by any sale of or agreement for valuing and dealing with the assignor's share which may have been entered into between the partners subsequently to the assignment and with notice of it"

and *Watts* v. *Driscoll*[6] is cited in support of the statement of law. Mr. Varadachariar while recognising the force of these authorities relies on section 263 of the Contract Act for the proposition that the rights and obligations of the partners continue in all things necessary for winding up the business. He therefore contends that the 1st defendant who was the managing partner has a right to make collections and put up to sale items of the assets belonging to the partnership and realise them in the shape of money and deal with the claims of the

1. (1916) 4 L.W. 10.
2. (1924) 87 I.C. 812.
3. (1918) A.C. 239.
4. (1810) 17 Ves. 298.
5. (1881) 6 A.C. 64.
6. (1901) 1 Ch. 294.

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servants of the partnership. This is true; but in the present case the two very important items of the assets of the partnership are: (1) the *inams* or the amounts due from various constituents of the firm to the firm on money-lending transactions, and (2) the house belonging to the partnership. According to the settlement of accounts the inams were taken up by the new firm at the value of the principal amounts, the interest being remitted. Similarly a certain valuation was put upon the house and it was taken up by the new firm. This is different from putting up these items to a public sale in open market after due notice to the public. Here they were taken over by another firm consisting of two of the partners of the dissolved firm. It cannot be said that such a transaction should not be scrutinised and must be taken to be *prima facie* binding on the assignee unless it is shown to be *mala fide*. On the other hand such a transaction is *prima facie* not binding. The Court is therefore entitled to look into the matter itself. The Lower Court has given certain valuations of the *inams* and the house on the evidence on record and we are not prepared to differ from its conclusions. Some of the items in the *inams* were disallowed and others were allowed. As to the other items of assets, one of them is item 6 in Ex O. It related to the salary of Arunachalam and under this head the Subordinate Judge disallowed 1,138 dollars out of the figure mentioned in the settlement on the ground that the agent Arunachalam was also attending to the new firm. But he was engaged for a term of three years and the work of winding up was going on certainly during these years. The fresh business was started on 25th January, 1919. Anyhow, the partnership has no right to stop his salary during the term ordinarily agreed upon which among Chetties is admitted to be three years. We think this item must be allowed, that is, the figure allowed by the Subordinate Judge must be diminished by the plaintiff's share of this item, namely 215 dollars. As to the other items we are not prepared to differ from the Subordinate Judge. The first item (which is a very large item) is described as *samans, i.e.*, presents allowed to agents among Chetties. In the present case the agent is a brother-in-law of the 1st defendant who was a partner of the old firm. He is also a partner of the new firm. It was said that the amount of the *samans* was really drawn by the agent some time before and the parties were only settling the claim in 1920. This is true, but it is not clear how much of the amount was drawn before January, 1919 and how much after January, 1919. In these circumstances we are not prepared to

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interfere with the conclusions of the Subordinate Judge. Similar remarks apply to the other items, particuarly to the third item which related to the *samans* of an earlier agent Avadayappa Chetty. The result is that the Subordinate Judge's conclusion on the first question must be confirmed subject to the diminution of the amount awarded to the plaintiff by 215 dollars.

On the second point the Subordinate Judge relied on the decision in *Manners* v. *Pearson & Son.*[7] In this case Lindley, M.R. and Rigby, L.J., held that the date of the ascertainment by the Court must be the date of conversion. The defendant pleaded that the amount due was found to be a certain amount on the 31st August 1896 but offered to convert it into English money only on 13th November, 1897. The plaintiff insisted on 31st August 1896 or certain earlier dates as the proper dates of conversion. The Court ascertained the amount on 4th November 1897 and held that that date was the date to be adopted for conversion. Vaughan Williams, L.J., dissented. He thought that 31st August 1896, the date on which a certain sum of money was found due to the plaintiff should be the proper date. In *Di Ferdinando* v. *Simon*[8] Roche, J. held that the conversion should be made not on the date when the Court ascertained the amount but on the date when it was properly due to the plaintiff, that is, in that case the date when the breach was committed. In the case of a partnership which is wound up the date of the termination of the winding up would be the proper date. Roche, J., distinguishing an earlier decision of his own apparently deciding a different principle. This decision was confirmed by the Court of Appeal in *Di Ferdinando* v. *Simon, Smits and Co.*[9]. Bankes, L.J., followed the dissenting judgment of Vaughan Williams, L.J. A similar rule was applied by Bailhache, J., in *Barry* v. *Van Den Hurk*[10] and this decision though it did not go to the Court of Appeal was approved by Bankes and Scrutton, L.JJ., in *Di Ferdinando* v. *Simon, Smits and Co.*[9] already mentioned. So also the same rule was applied by McCardie, J., in *Lebeaupin* v. *Richard Crispin and Company.*[11] This was also approved by the same Judges in the Court of Appeal. Finally in *S. S. Celia* v *S. S. Volturno*[12] Lord Buckmaster approved the view of Vaughan Williams, L.J. and was not prepared to accept the view of Lindley, M.R. and Rigby, L.J. He also approved of the case in *Di Ferdinando* v. *Simon.*[8] I think the decision in *Manners* v. *Pearson and Son*[7] has practically ceased to be the

7. (1898) 1 Ch. 581
8. (1920) 2 K.B. 704.
9 (1920) 3 K.B. 409.
10. (1920) 2 K.B. 709.
11. (1920) 2 K B 714.
12. (1921) 2 A C 544.

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law and it seems to me that we have nothing to do with the date of the determination of the amount by the Court. The plaintiff's share was certainly ascertainable by 6th December 1920 when the winding up was completed and the accounts were ready according to the 1st defendant's own statement and if the plaintiff was willing to accept the amount he could have taken the amount that might be ascertained as the proper amount due on that date. It is true that this need not be the amount which the defendants were willing to offer. But still the assets of the partnership may be held to have crystallised on that date and the only question remaining for the Court would be to decide the difference between the parties. It is impossible to accept any date earlier than 6th December 1920 because the winding up was not completed and not until after the partnership assets are all realised and converted into money can the share of a partner be settled—*vide* Lindley, J., p. 427. On the 6th December 1920 the rate was Rs. 154-8-0. The appellant gains only Rs. 1-8-0 by our view. To this extent the judgment of the Lower Court is modified.

The memorandum of objections in Appeal No. 204 of 1925 relates to the value of the house. We have already held that there is no reason to disturb the finding of the Subordinate Judge in this matter. Another item in the memorandum of objections is a claim for the rent of the house up to the date of suit. But if the plaintiff has got his share of the value of the house in December, 1920, the house being sold some time in 1920, there is no question of any claim for rent. Another ground in the memorandum of objections is that the date of the preliminary decree ought to be adopted as the date of conversion. This question has already been dealt with in the judgment in the main appeal.

In Appeal No. 340 the only point is the rate of interest that should be allowed to the plaintiff. Some of the inams of the suit firm were taken over by the new K.R.V.R. firm. In such a case it is now conceded to be the law that the assignee is entitled at his option either to the profits of the new firm or interest. In the present case he elected to take interest. The Subordinate Judge held that the reasonable rate of interest to be given to the plaintiff is 9 per cent. The plaintiff wants this to be increased and the defendant in the memorandum of objections wants it to be reduced to 6 per cent. We think the rate allowed by the Subordinate Judge is the reasonable rate and we decline to interfere with his discretion. This is the course followed by

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the Privy Council in *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*.[13]

The result is Appeal No. 340 of 1924 and its memorandum of objections are dismissed with costs. Appeal No. 204 is modified as indicated above. The memorandum of objections is dismissed with costs. In Appeal No. 204 the parties will give and take proportionate costs. In the Lower Court also the parties will give and take proportionate costs.

Jackson, J.—I agree.

Appeal No. 340 of 1924 and Memo. of Objections dismissed.

Decree of Lower Court modified in Appeal No. 204 of 1924.

N.S.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD ATKIN AND SIR LANCELOT SANDERSON.

P. C.

Binda Prasad v. Lala Kishori Saran.

Binda Prasad and another .. *Appellants** (*Plffs.*)

v.

Lala Kishori Saran and others .. *Respondents* (*Defts.*).

Contract—Sale of immoveable property—Contract for—Completed contract or not—Evidence—Time for completion of contract—Failure to fix—Completion within reasonable time in case of—Duty as to.

Where the time for completion of a contract for the sale of immoveable property is not specifically fixed it would be the duty of the parties to complete within a reasonable time.

In a suit for specific performance of an alleged contract for the sale of immoveable property the issue between the parties was whether there was a contract, the plaintiffs alleging a contract, the defendants denying a contract and alleging that there was not even negotiation for a contract. There was no dispute as to the subject-matter of the alleged contract. According to the plaintiffs' story they were actually put into possession of the property, which was the subject-matter of the contract; the price was arranged and a portion thereof was paid as earnest money

Held, reversing the High Court and restoring the Subordinate Judge, that there was sufficient evidence in the case to establish a contract

Appeal No. 62 of 1927 from a judgment and decree, dated 2nd April, 1924, of the High Court, Allahabad (Mukerji and Dalal, JJ.), reversing a judgment and decree of the Court of the Subordinate Judge of Cawnpore, dated 8th July, 1921.

De Gruyther, K.C., Abdul Majid and *B. P. Singh* for appellants.

Dunne, K.C. and *J. M. Parikh* for respondents.

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13. (1915) L.R. 42 I.A. 91: I.L.R. 42 C. 914: 29 M.L.J. 70 (P.C.).

*P.C. Appeal No. 62 of 1927. 11th February, 1929.

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Sir Lancelot Sanderson.

11th Feb. 1929. Their Lordships' judgment was delivered by

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiffs in the suit against the judgment and decree of the High Court of Judicature at Allahabad, dated the 2nd of April, 1924, whereby the judgment and decree of the Court of the Subordinate Judge of Cawnpore, dated the 8th of July, 1921, was reversed.

The suit was instituted on the 3rd August, 1920. The plaintiffs alleged that on the 3rd December, 1919, at Fatehpur, Kishori, the first defendant, entered into a contract with Gobind Prasad, the second plaintiff, who was acting for both the plaintiffs, for the sale of Mauza Rithuan, permanent *mahal* of 16 annas of Kishori Saran, and his eight annas' share in the fluctuating *mahal*.

The plaintiffs claimed specific performance of the alleged contract.

The defendant Kishori, and the other three defendants, who were subsequent purchasers of the property in suit from the first defendant in August, 1920, denied the alleged contract between Kishori and the plaintiffs.

The learned Subordinate Judge decided in favour of the plaintiffs and directed that, on the plaintiffs paying Rs. 42,000 within one month, their claim for possession should be decreed with costs against all the defendants, that the deed conveying the property to the second, third and fourth defendants should be cancelled, and that the defendants should execute a sale-deed in favour of the plaintiffs.

The defendants appealed to the High Court, which allowed the appeal, set aside the decree of the learned Subordinate Judge, and dismissed the suit.

The plaintiffs have appealed to His Majesty in Council from the said decree of the High Court.

It appears that the Mauza Rithuan was originally one entire *mahal*. It was situated on the banks of a river and its area was liable to fluctuation.

There was a partition of the permanent portion into a 16 annas *mahal* of Kishori Saran and another 16 annas *mahal* of Kishori's brother.

The fluctuating portion was formed into one *mahal* Ehtamali, in which each of the brothers had an 8 annas' share.

The second, third and fourth defendants in 1913 acquired the interest of Kishori's brother for Rs. 24,000, and thus they

became co-sharers with Kishori in the *mahal* Ehtamali (fluctuating), but not in the permanent *mahal* of Kishori Saran.

Kishori had mortgaged to the plaintiffs in 1911 other property belonging to him for Rs. 17,000 and interest; this property was nearer the town and was alleged to be more valuable than the property in suit.

At the time of the suit the amount owing in respect of the mortgage was about Rs. 33,000.

The plaintiffs' case was that Gobind Prasad, the second plaintiff, whose residence was at Kora, went to Fatehpur on the 2nd December, 1919; that he stayed at the house of Krishna Behari Lal, who is the younger brother of Kishori; that he told Krishna Behari that Kishori was asking Rs. 45,000 for the property in suit; that Lachman Prasad, the father of Gobind, was offering Rs. 40,000, and that he asked Krishna Behari to get the sale effected for Rs. 1,000 or Rs. 2,000 more than what had been offered; that Krishna Behari did use his influence with Kishori and that on the following day, *viz.*, the 3rd December, 1919, Gobind Prasad agreed with Kishori to purchase the property for Rs. 43,000.

It was alleged that one Gobind Prasad, son of Badir Prasad, a Brahman, happened to come to the house of Krishna Behari, and that he was present when the alleged contract was made.

It was further alleged by the plaintiffs that on the 15th December, 1919, Lachman Prasad and his son Binda, the first plaintiff, went to Fatehpur, taking Rs. 1,000 with them, that they spent the night at the house of a *mukhtar* named Ram Adhin, that on the morning of the 16th December Lachman and Binda went to the house of Kishori and paid him Rs. 1,000 as earnest money in respect of the contract made by Gobind Prasad on the 3rd December. It was alleged that Kishori received the money and handed it to his treasurer.

Lachman in his evidence said:

> "My son asked for a receipt, but I prevented him from doing so, saying that there have been dealings with him since a long time, and that no such thing can take place at his house." "He (*i.e.*, Kishori) said he would execute the document soon, that he would send the *karinda* within two or four days, and that I should make collections."

There is no doubt but that Mani Ram, the *karinda* of Kishori, in the early part of 1920, went to the village, taking a rent roll, that the plaintiffs or one of them collected the *kharif* rentals for 1327 *Fasli*. These rentals, amounting to about

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Rs. 1,100, were in respect of the autumnal harvest in October and November, 1919.

The plaintiffs granted receipts, had the collections recorded in the *patwari* papers, and deposited the Government revenue, which amounted to about Rs. 600.

The plaintiffs' case was that this collection of rents by them was in accordance with the arrangement made between Kishori and Lachman on the 16th December, 1919. It was alleged by them that the rentals collected were in respect of the permanent *mahal* and that when they wanted to collect rent in respect of the fluctuating *mahal* they were stopped by the defendant Kishori; they allege that the reason for such stoppage was that at this stage the defendants, who subsequently became the purchasers, had intervened.

The case of Kishori, the first defendant, was that he had no talk at all with Gobind Prasad regarding the sale of the property at the house of Krishna Behari, as alleged by the plaintiffs, and that he never had any negotiations for the sale of the village personally or through any one else with Lachman Prasad. He denied that Lachman and Binda had paid Rs. 1,000 or any sum as earnest money.

He alleged that he was unable to pay the interest on the above-mentioned mortgage debt and therefore he allowed the plaintiffs to collect the *karif* rentals for 1327 *Fasli* of the property in suit.

His case was that negotiations for the sale of the property to the other defendants had been going on for four or five years, and no one other than these defendants had expressed a desire to purchase it.

It appears that a deed of conveyance of the property by Kishori to the other defendants was executed on the 9th August, 1920, by which the property was sold to the other defendants for Rs. 45,000. The deed recited that Rs. 2,000 had been paid by the vendees to Kishori as earnest money, that he had left Rs. 33,627 with the vendees in order that it might be paid by the vendees to the plaintiffs for the purpose of settling the mortgage debt and interest; it was further provided that, in case the plaintiffs refused to receive the amount, the vendees should pay the money into Court.

The learned Judges of the High Court came to the conclusion that Kishori had given his evidence as an honest and straightforward man.

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In a later part of their judgment however they said that—

"It is possible to concede in favour of the plaintiffs that they either by themselves or through some intermediary proposed that the property should be sold to them, but this would not be sufficient for the success of their case. They must prove definitely that a certain particular sum of money was agreed to be paid by them and that defendant No 1 in lieu of that sum agreed to hand over his property to them."

This last finding seems to their Lordships to be inconsistent with their conclusion that Kishori was an honest and straightforward witness, for he had quite clearly made the case in his evidence that he had no negotiations for the sale of the property personally or through any one else with the plaintiffs.

It may be noted that the learned Subordinate Judge did not accept Kishori as a reliable and straightforward witness, as he found against the case put forward by him.

In dealing with the evidence of Kishori, *viz.*, that he allowed the plaintiffs to go into possession of the property in suit in order to meet the interest on the mortgage, the learned Judges seem to have been much impressed by the fact that on a previous occasion the plaintiffs had been put into possession of property which had been mortgaged by Kishori's nephew, and had made collections of rent in respect thereof, and stated that it would not be strange if another experiment like that was intended.

The learned Judges do not appear to have noted the material difference between the two transactions, *viz.*, that whereas in the case of the mortgage by Kishori's nephew the plaintiffs went into possession of the mortgaged property, whereas in the present case it was not the mortgaged property of which the plaintiffs collected the rents, but it was property to which the mortgage had no relation at all. Further, the learned Judges appear to have attached no importance to the fact that, although the plaintiffs undoubtedly did collect some rents, which Kishori alleged were to go towards payment of the interest on the mortgage on the other property, he did not deduct any sum in respect of such collections from the amount deposited in Court in respect of the mortgage principal and interest.

There is another matter well worthy of consideration. The Rs. 1,000 alleged by the plaintiffs to have been paid on the 16th December, 1919, as earnest money appears in the plaintiffs' books under date December 18, 1919.

The learned Subordinate Judge, after a careful consideration of the allegations put forward on behalf of the defendants, came to the conclusion that the entry was genuine.

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The learned Judges of the High Court came to the conclusion that the entry could have been made at any time in the plaintiffs' books and rejected it as being of no evidentiary value.

Their Lordships have not seen the books themselves and can form no opinion of any value from the extracts which have been included in the record. They are of opinion, however, that the reasons given in the judgment of the High Court do not seem sufficient to dispose of the finding of the learned Subordinate Judge as to the genuineness of the material entries in the plaintiffs' books.

There are other matters in the judgment of the High Court which were subjected to criticism by the learned counsel for the plaintiffs. It is not necessary at present to refer to them in detail. It is sufficient to say that their Lordships are not prepared to accept the reasoning which led the learned Judges of the High Court to decide in favour of the defendants.

The question remains whether the conclusion at which the High Court arrived was correct or whether the decision of the learned Subordinate Judge should be maintained.

There are several circumstances in connection with the plaintiffs' case which are calculated to give rise to hesitation in accepting it.

As, for instance, it is not easy to adopt as sufficient the reason alleged for no receipt being given for the Rs. 1,000 said to have been paid as earnest money by the plaintiffs on the 16th December, 1919. Further, it is curious that Kishori, as held by the learned Subordinate Judge, should have suggested that the plaintiffs should begin collecting rents and that he would depute his *karinda* to help them, at a time when he had been paid Rs. 1,000 only on account of the total amount of Rs. 43,000, when it was not settled at what date the alleged contract would be completed and when it was not certain whether it ever would be completed.

It seems strange that during the alleged negotiations there should be, as stated by the plaintiffs, no reference to the amount owing by Kishori to the plaintiffs on the mortgage, and that the plaintiffs should be prepared to pay Rs. 43,000 to Kishori, without claiming any set-off in respect of the mortgage debt. It may however here be added that it is nowhere suggested that this debt was not adequately secured.

It was alleged that a *vakil*, B. Mahesh Prasad, had been asked by the plaintiffs to draft a sale-deed. Proof of this by the learned *vakil* would have been of considerable evidentiary

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value; yet he was not called; the reason given was that the learned *vakil* was conducting the case in Court for the plaintiffs.

There is no entry in the books of Kishori of the payment of the Rs. 1,000, which was alleged to have been handed by Kishori to his treasurer on the 16th of December. The entry should have been made in the ordinary course and, if the plaintiffs' story be correct, there would be no reason why that payment should not be entered in the books forthwith. The absence of such an entry is certainly significant.

On the other hand, it has to be noted that no receipt for the earnest money of Rs. 2,000 which, as appears from the deed of the 9th August, 1920, had been paid on the defendants' purchase is produced: nor does Kishori point to any entry in his books of that payment, and there are certain matters which militate against the case of Kishori being accepted, one of which is that their Lordships are of opinion that the finding of the learned Subordinate Judge that negotiations between the plaintiffs and Kishori for the purchase of the property had been going on, is correct. Indeed, it would appear from the passage in the judgment of the High Court, which has been already quoted, that the learned Judges of that Court were of the same opinion.

The material question which remains is whether the plaintiffs proved that the negotiations resulted in the conclusion of a contract, the material terms whereof were settled.

Much importance was attached, and, in their Lordships' opinion, rightly attached, by both the Courts in India to the fact that the plaintiffs went into possession of the property in suit and collected the rents.

The main question in relation to that part of this case is what was the reason or occasion for such possession. Was it because of the alleged purchase by the plaintiffs, or was it for the purpose of keeping down the interest on the mortgage?

For the reasons given above and for other reasons mentioned by the learned Subordinate Judge, their Lordships are of opinion that it would not be safe to act upon the verbal evidence of the plaintiffs or of the defendants in this respect, unless it were confirmed in material respects.

It is therefore necessary to consider whether reliable confirmation of either party's case can be found in the facts about which there can be little doubt.

Kishori's evidence was to the effect that negotiations had been going on for a considerable time between him and the other

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defendants with regard to the purchase of the property. He was willing to sell, and the other defendants wished to buy; the only question was as to the amount to be paid.

It appears from the evidence of Bhagwati Prasad, who was regarded by the learned Subordinate Judge as a reliable witness, that in February or March, 1920, he had a conversation with Chunnan Lal, the second defendant, and that it was clear to him, Bhagwati, from the conversation that, as far as the transaction between Kishori and Chunnan Lal was concerned the purchase price had not been agreed at that time.

If, then, in December, 1919, the proposed purchase was still the subject of negotiation between Kishori and Chunnan Lal, and Kishori then regarded the other defendants as possible and even probable purchasers, and if, as Kishori said in his evidence, no person, other than those defendants, had expressed any desire to purchase, it seems improbable that he would have suggested to the plaintiffs that they should go into possession of the property in suit, which was not the subject of the mortgage, in order to make a collection of rents to meet the interest accruing due under the mortgage on another property. Such a possession by the plaintiffs would be calculated to complicate the position if and when Kishori was able to arrange the sale to the other defendants, as, according to his case, he was anxious to do.

Again, if Kishori's story were true, it would seem only natural that Kishori would have specified some period to which the possession of the plaintiffs and their right to collect the rents should be limited; but no limitation of time apparently was arranged.

On the other hand, if the plaintiffs were put into possession of the property and allowed to collect the rents because of the fact that Kishori had agreed to sell the property to them, there would be no reason for Kishori to stipulate any period for their possession, because in the ordinary course the property would be conveyed to the plaintiffs in pursuance of the contract.

Their Lordships have already referred to the fact that the net balance of the rents collected by the plaintiffs was not taken into account by Kishori when the total amount of principal and interest due on the mortgage was ascertained and paid into Court. This is entirely inconsistent with Kishori's story, and the explanation given in evidence by Kishori that the said sum was not taken into account because some more money was due from him to the plaintiffs under a note of hand, and which

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might be about Rs. 500, does not appeal to their Lordships as satisfactory.

It seems fairly clear that the plaintiffs were prevented by Kishori from making the collections of rents in respect of the *mahal* Ehtamali, in February or March, 1920. Upon that event happening there is no doubt that Gobind Prasad sent the notice in writing, dated 23rd March, 1920, to Kishori. That notice was not received by Kishori, and it was returned to the sender, as the addressee was not found at this house; he had gone to Muttra.

The fact, however, remains that in the letter of the 23rd March, 1920, Gobind Prasad put on record the case, which is substantially the same as that on which the plaintiffs rely in this suit. He alleged the contract, the payment of earnest money, the collection of the rents, the payment of Government revenue, and asked to be informed as to when Kishori would execute the sale-deed.

This part of the plaintiffs' case is open to the comment that it is strange that when they found that this notice of 23rd March, 1920, was not delivered to Kishori, they did not send another to him and take care that it was delivered.

There is no doubt, however, that the letter of the 1st April, 1920, from Gobind Prasad to Chunnan Lal, Manna Lal and Mathura Prasad, the other three defendants, was received by them.

In that letter Gobind Prasad again referred to the contract between him and Kishori, the payment of the earnest money and the collection of rent, and stated that nothing remained except the execution of the deed. Having heard that they proposed purchasing the property, he warned them against proceeding therewith.

It is only reasonable to assume that on the receipt of this notice Chunnan Lal and the other defendants must have communicated the substance of it to Kishori, whether the position, as between Kishori and them, was that there was a completed contract, or whether the proposed purchase was still the subject of negotiation.

That being so, it certainly is astonishing, if Kishori's story be true, that no reply denying the statements contained in the letter of the 1st April, 1920, was sent to the plaintiffs by any of the defendants.

The next communication in writing appears to have been on the 28th July, 1920, from Kishori to the plaintiffs and their

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father Lachman, informing them that he had made arrangements for the payment of the debt due to them, and informing them that they could go to the office of the Sub-Registrar of Fatehpur and receive the amount.

It is obvious that by that time the purchase had been arranged between Kishori and the other defendants.

There is a copy of a telegram from Kishori to Mahesh Prasad, the plaintiffs' *vakil* at Cawnpore, dated the 29th July, 1920, which ran as follows:—

"No talk for sale of Rithuan from Binda Prasad, Gobind Prasad. Money ready to pay their debts. Come to take money as noticed."

The terms of the telegram look as if Mahesh Prasad had communicated by telegram or otherwise with Kishori, alleging that he was under contract with the plaintiffs to sell the property, but there is no such telegram in the record.

The above-mentioned correspondence is consistent with the plaintiffs' case, and it is remarkable for the fact that though the defendants, in the opinion of their Lordships, had notice through the letter of April 1, 1920, of the plaintiffs' claim, none of the defendants replied thereto or denied that claim until July, 1920, when Kishori obviously had been able to arrange the sale of the property in suit to the other defendants at a price higher than that at which the plaintiffs allege they had agreed to purchase the property.

The case is a difficult one by reason of the direct conflict of evidence of the parties concerned, by reason of the fact that none of the defendant purchasers were called as witnesses or their books examined, and by reason of what seems to their Lordships to have been an inadequate investigation upon some material points.

It is a matter of comment that the plaintiffs' case was that the alleged contract was made in the house of Krishna Behari Lal, and that in the letter of 23rd March, 1920, they seem to have relied upon him as a person who would support the plaintiffs' allegations, yet when Krishna Behari Lal was called as a witness for the defendants he denied the whole of the plaintiffs' case so far as he was concerned.

Their Lordships appreciate that there is much to be said in support of the conclusion at which the learned Judges of the High Court arrived, though they are not prepared, as already stated, to accept the reasons upon which the judgment of the High Court was based, but after due consideration of the very full and adequate arguments presented by the learned Counsel

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on both sides, they have come to the conclusion that there was sufficient evidence before the learned Subordinate Judge to justify him in holding that the negotiations, which had been carried on between Kishori and the plaintiffs, resulted in a contract.

The issue between the parties was whether there was a contract, the plaintiffs alleging a contract, the defendants denying a contract and alleging that there was not even negotiation for a contract.

There was no dispute as to the subject-matter of the alleged contract. According to the plaintiffs' story they were actually put into possession of the property, which was the subject-matter of the contract; the price was arranged, *viz.*, Rs. 43,000, and Rs. 1,000 as earnest money was paid.

The time for completion was not specifically fixed, and in the absence of any specified time it would be the duty of the parties to complete within a reasonable time.

There is no doubt that the defendants, who bought from Kishori, had ample notice of the plaintiffs' claim; in fact, the purchase was not completed by them until 9th August, 1920, which was after the institution of the plaintiffs' suit.

For these reasons their Lordships are of opinion that the appeal should be allowed, that the decree of the High Court should be set aside, and that the decree of the learned Subordinate Judge should be restored. The defendants must pay the costs of the plaintiffs in the High Court and of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Douglas, Grant & Dold.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—VISCOUNT DUNEDIN, LORD CARSON AND SIR CHARLES SARGANT.

Ma Sin and others .. *Appellants**

v.

The Collector of Rangoon .. *Respondent.*

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Land Acquisition Act (I of 1894). Ss. 23 and 6—Acquisition of land—Notifications prior and subsequent, latter purporting to cancel former—Market value of land—Determination of, under S. 23—Date material of, date of second notification or of first

*P.C. Appeal No. 106 of 1927. 12th February, 1929

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On 31st May, 1922 the Government published a declaration under S. 6 of the Land Acquisition Act, 1894, that the appellants' land was required for a public purpose. On 6th October, 1923, they published another declaration under S. 6, specifying the same land belonging to them, but, at the same time, announcing that the former declaration was cancelled.

Held, reversing the High Court (Appellate Side), that the only notification which gave right to take the appellants' land was the second notification, and that therefore its date was the date for ascertaining the market value of the land within the meaning of S. 23, sub-section (1), clause (1) of the Land Acquisition Act.

Consolidated appeals No. 106 of 1927 from two decrees of the High Court (Rutledge, C.J. and Maung Ba, J.), dated the 1st February, 1926, modifying two decrees of that Court made in its Original Jurisdiction (Cunliffe, J.), and dated the 28th May, 1925.

For the purposes of the present report, the material facts of the case are set out sufficiently fully in their Lordships' judgment.

The main question on the appeal to the Privy Council was whether the Courts below should have awarded compensation to the appellants according to the market value of their property when Government first notified it and other properties for acquisition, or on the date when Government having abandoned its intention of acquiring some of the properties notified, issued a notification for acquisition of the appellants' properties and for cancellation of the first notification.

The High Court, on its Appellate Side, thought that they ought to award the market value of the land at the date of the first notification, the 31st May, 1922. Their reasoning was as follows:—

"In that notification it was proposed to acquire, besides the two plots in dispute, two more adjoining plots belonging to U Po Kin and Messrs MacGregor and Company. Subsequently it was decided to leave out those two plots, and consequently, the second notification was published on the 6th October, 1923, which was confined to the two plots of Maung Ba Kyaw and Ma Sin (the appellants) In respect of these two plots the acreage and the description remain unaltered Though the word 'cancelled' was used to mean that the first notification was either superseded or modified, the first notification practically remained good so far as these two plots of Maung Ba Kyaw and Ma Sin are concerned So in our opinion the market value at the date of the publication of the first notification should be the market value to be considered"

Samuel Moses for appellants.

Sir Geo. R. Lowndes, K.C. and *E B. Raikes* for respondent.

Moses contends that the Court below should have valued the land by fixing the market value thereof at the date of the second notification, 6th October, 1923, instead of at the date of the first notification, 31st May, 1922, which had been cancelled.

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by the second notification. Refers to section 48, Land Acquisition Act.

[*Lord Carson.*—It was open to the Government to cancel the notification.]

Lowndes, K.C.—The Appellate Court rightly awarded compensation on the basis of the market value of the land on 31st May, 1922.

[*Viscount Dunedin.*—The question is, can the Government put its blunder right?]

The only provision in the Act is as to withdrawal from the acquisition of any land of which possession has not been taken; section 48.

[*Lord Carson.*—I don't see why under section 48 the Government should not be able to say, that we don't want to take the other land.]

Obviously, the Government cannot cancel the first notification and issue a second one in order to get the benefit of a drop in the market value.

[*Sir Charles Sargant.*—When the Government cancelled the former notification and issued the second one, could they still throw the market value on to the date of the first notification?]

[*Lord Carson.*—The Act says that the land is to be valued as on date of the notification under which the land is acquired.]

12th February, 1929. Their Lordships' judgment was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—This is an appeal from the High Court of Judicature at Rangoon in a case in which they have altered the finding of the Judge of the High Court of the Original Side in a land acquisition case.

The Government on the 31st May, 1922, had published a declaration under section 6 of the Land Acquisition Act, 1894, that the appellants' land was required for a public purpose, and that declaration included, besides the land which they desired to take from the appellants, certain land belonging to other people. The Government seemingly changed their mind about requiring the land of the other people, and accordingly on the 6th October, 1923, they published another declaration under section 6, specifying the same land belonging to them, but, at the same time, announcing that the former declaration was cancelled.

The matter went before the Collector and he gave a certain award, to which their Lordships need make no further allusion.

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An appeal* was taken to a Judge of the High Court and that Judge made an award by which he awarded Rs. 6,500 per acre in respect of one plot and Rs. 3,800 per acre in respect of another plot. Appeal and cross-appeal were taken to the Appellate Court, and the Appellate Court altered that judgment, replacing the figure of Rs. 6,500 per acre by a figure of Rs. 5,600 per acre, and replacing the figure of Rs. 3,800 per acre by a figure of Rs. 2,750 per acre.

The Appellate Court, in considering the sales upon which they based their judgment, after mentioning the two notifications, which their Lordships have already referred to, then said:

"Though the word 'cancelled' was used to mean that the first notification was either superseded or modified, the first notification practically remained good so far as these two plots of Maung Ba Kyaw and Ma Sin are concerned So in our opinion the market value at the date of the publication of the first notification should be the market value to be considered"

Their Lordships are unable to take that view, because it is absolutely in the teeth of clause (1), sub-section (1) of section 23 of the Land Acquisition Act, 1894, which says that, in determining the amount of compensation to be awarded, the Court shall take into consideration "the market value of land at the date of the publication of the declaration relating thereto under section 6."

Now, it is perfectly certain that the only notification which gave right to take this land was the second notification, and therefore that date must be the date taken. That really vitiates the judgment of the Appellate Court. It is apparent from the figures that all this land was galloping upwards in value, and in particular, that sales were proved, after the date of the first notification, but before the date of the second, which showed a highly increased value, and that it was in considering those sales, as well as the former sales, that the learned Judge of first instance came to the result that he did. Their Lordships are therefore clearly of opinion that the judgment of the Appellate Court cannot stand and that, as there seems nothing to be said against the judgment of the Judge of first instance, that must be reverted to.

Their Lordships will humbly advise His Majesty accordingly to allow the appeal, to set aside the decree of the High Court in its Appellate Jurisdiction with costs, and to restore the judg-

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*An appeal, in the above passage, obviously refers to the reference under sections 18 and 19 of the Land Acquisition Act to the Court from the Collector's award.—*K. J. R.*

ment of the first Judge The appellants will have the costs of this appeal.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *Sanderson Lee & Co.*

K.J.R. *Appeal allowed.*

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Reporter's Note—Section 23, clause (1), sub-section (1) of the Land Acquisition Act, 1894, was amended by Act XXXVIII of 1923, and now reads as follows:—

"The market value of the land at the date of the publication of the notification under section 4, sub-section (1)."

This alteration was apparently not brought to their Lordships' attention, as in their judgment they quote from the section as it stood before its amendment in 1923.—*K J R*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD SHAW, LORD ATKIN AND SIR LANCELOT SANDERSON.

Raja Bhawani Singh .. *Appellant** (*Plff.*)

v.

Maulvi Misbah-ud-din .. *Respondent* (*Deft.*).

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Principal and Agent—Agent—Money or property entrusted to—Principal's title to—Agent's right to question—Estoppel—Account of moneys and property entrusted to him—Agent's duty to render

An agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title unless he proves a better title in a third person and that he is defending on behalf of and with the authority of the third person. The same principle controls the relation of bailor and bailee, which may come into existence without the added relation of principal and agent The agent is certainly in no better position than the bare bailee.

As between principal and agent, there is a contractual position fortified by fiduciary relations, and one of the contractual terms is that the agent should render an account to the principal of his dealings with the property entrusted to him in the course of the mandate. This obligation cannot in any way disappear except by transfer of the contractual right by novation or operation of law: and it may well subsist, notwithstanding that the property proves to belong to some one other than the principal.

Appeal No. 33 of 1927 from a decree of the High Court, Lahore, (Martineau and Zafar Ali, JJ.), dated the 9th July, 1925 reversing two decrees of the First Class Subordinate Judge of Delhi, dated respectively the 15th December, 1922 and the 30th April, 1923.

The appellant was the plaintiff in the suit and prayed in it for an order on the defendant to account to him for two sums of

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*P.C. Appeal No. 33 of 1927. 26th February, 1929.

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money which he had paid to the defendant as his agent. The trial Judge passed first a decree for account and then a decree for the amount found due, but the High Court (on appeal) dismissed the suit on the ground that the plaintiff had lost his right to call the defendant to account.

The main question in the appeal to the Privy Council was whether the plaintiff had a *locus standi* to sue for an account of the sums advanced by him to the defendant as his agent.

E. B. Raikes for appellant.

The respondent was not represented at the hearing.

26th February, 1929. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—This is an appeal from a decree of the High Court at Lahore who reversed two decrees of the Subordinate Judge of Delhi in a suit brought by the plaintiff against the defendant, claiming an account of monies entrusted to the defendant as agent, and payment of the amount found due. The plaintiff at the time of the transactions in question was the Rais or Chief of the State of Sheopur-Baroda. In August, 1918, he entrusted the defendant as his agent with the sum of Rs. 5,000, and in January, 1919, with the sum of Rs. 12,250 to be applied for the purposes of the plaintiff. The receipt of these sums is admitted. It has been found that the defendant has not accounted for the greater part of the sums so received. The defendant, however, has relied on a plea that the money he received was State money: and that the plaintiff had no right to sue, because in January, 1919, he was deposed from his position as Rais or Chief by the authorities of the State of Gwalior. What the precise relations are between Sheopur-Baroda and Gwalior is a matter which their Lordships deem unnecessary to consider in this case. It appears that up to the 19th January, 1919, the plaintiff was in possession of the revenues of Sheopur, and controlled their administration. There was some dispute at the hearing whether the money entrusted to the defendant was entrusted to him for public purposes or private purposes of the plaintiff: whether it came from the public revenue or from the private purse of the plaintiff. The Subordinate Judge appears to have inclined to the view that it was a private transaction: the High Court held that it concerned public money. In January, the authorities of the State of Gwalior were apparently dissatisfied with the plaintiff's administration: and sent to Baroda a Superintendent, to control the collection and administration of the revenue. The Superintendent appeared with suffi-

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cient force to execute his orders, and thenceforward the control of the revenues of the State appears to have passed from the plaintiff to the Superintendent. No question arises at all in this case as to the validity of these proceedings. The High Court find that the plaintiff was deposed. If this finding were material their Lordships can discover no evidence to support it. The evidence of the plaintiff's witnesses is to the contrary, while the defendant admitted that the plaintiff is still entitled Rais and that all ceremonial functions are performed by him. Finding, however, that the money belonged to the State and that the plaintiff had been deposed before the institution of the suit and had been divested of all control over the State treasury, the learned Judges of the High Court find that he had no *locus standi* to recover the amount due. Even assuming the correctness of the premises their Lordships consider the conclusions incorrect. The principle is well established that an agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title unless he proves a better title in a third person and that he is defending on behalf of and with the authority of the third person. The same principle controls the relation of bailor and bailee, which may come into existence without the added relation of principal and agent. The agent is certainly in no better position than the bare bailee. It may also be remarked that as between principal and agent there is a contractual position fortified by fiduciary relations, and that one of the contractual terms is that the agent should render an account to the principal of his dealings with the property entrusted to him in the course of the mandate. It is difficult to see how this obligation can in any way disappear except by transfer of the contractual right by novation or operation of law: and it may well subsist, notwithstanding that the property proves to belong to some one other than the principal. In the present case, however, it is unnecessary to distinguish between the right to have an account, and the right to receive the balance found to be in the agent's hands. The agency is admitted: the defendant does not suggest that he is defending for or with the authority of the State of Gwalior. He must therefore account to his principal, and leave him to settle his affairs with Gwalior if there is anything to settle. But in this particular case the defendant entirely fails to prove that Gwalior makes any claim to the money, or alleges that there has been any divesting of the plaintiff of his rights contractual or otherwise; indeed, it is quite consistent with the evidence

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